S. Hrg. 101-280

HATCH ACT REFORM AMENDMENTS OF 1989

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 135

TO AMEND TITLE 5, UNITED STATES CODE, TO RESTORE TO FEDERAL CIVILIAN EMPLOYEES THEIR RIGHT TO PARTICIPATE VOLUNTARILY, AS PRIVATE CITIZENS, IN THE POLITICAL PROCESSES OF THE NATION, TO PROTECT SUCH EMPLOYEES FROM IMPROPER POLITICAL SOLICITATIONS, AND FOR OTHER PURPOSES

JULY 25, 1989

Printed for the use of the Committee on Governmental Affairs

22-344

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S401-57

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HATCH ACT REFORM AMENDMENTS OF 1989

TUESDAY, JULY 25, 1989

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn (Chairman of the Committee) presiding.

Present: Senators Glenn, Levin, Kohl, Lieberman, Roth, Stevens, Cohen, and Heinz.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman GLENN. The hearing will be in order.

Good morning and welcome to today's hearing on S. 135, the Hatch Act Reform Amendments of 1989. S. 135 would amend the Hatch Act, the 1939 statute that severely limits the ability of Federal civilian and postal employees to be politically active. S. 135 proposes changes that would allow these civil servants to participate voluntarily as private citizens in the Nation's political processes.

We had extensive hearings over the last couple of years on this, as most of you are aware, and before we move the bill this year—which is the same bill that was in last year, identical—we thought it would be appropriate to have one more set of updating hearings, and that is the purpose of this meeting today. We have some new Committee members since last year and it was for this reason that we felt it was only fair to bring everyone up to date before we moved to markup any legislation in the Committee, which, incidentally, we have unanimous consent to do tomorrow.

S. 135 is a modest proposal developed by Governmental Affairs Committee members last year on a bipartisan basis; There were a few votes against it, I think the vote was 9 to 3. It would eliminate many of the complicated and restrictive rulings that presently govern the political activities of Federal civilian and postal employees.

S. 135 is identical to legislation reported out of the Committee last year. I introduced the bill in January, along with my distinguished colleagues, Senator Stevens, Senators Pryor, and DeConcini. And to date, roughly one-third of the Senate has cosponsored the legislation.

Fifty years ago the Hatch Act was enacted after it was disclosed that appointees in the Works Project Administration, the WPA, had coerced WPA workers into making political contributions in return for their jobs. It was a time when cronies and political patronage greased the bureaucratic machine. The solution offered by the Hatch Act was to bar Federal and postal employees from participating in partisan political activities.

When the Hatch Act was passed, the development of a professional Civil Service was being undermined by patronage appointments. More than 60 new Federal agencies had been created by the end of 1934, but only five had been placed under the jurisdiction of the Civil Service Commission. This meant that the majority of these agencies were being staffed on the basis of political patronage rather than merit competition. And this rapid growth of patronage jobs—more than 300,000 of them—created Congressional concern that some civil servants might be working for partisan rather than national interests.

Today, however, civil servants work in a much different environment. The patronage-based system of the past has given way to a Merit System in which civil servants are hired and promoted on a competitive basis. Safeguards have been created to protect Federal workers from arbitrary or politically-motivated job actions.

The Hatch Act's sweeping restrictions of civil servants' political rights is in many respects irrational and archaic. Congress voted the Hatch Act into law without hearings and with minimal debate. In fact, when it was considered on the floor it turned out that it applied even to the President, Cabinet members and members of Congress. It had to be amended in order to permit Senators and Congressmen to run for reelection without the restrictions of the Hatch Act preventing them from political activities. This is how fast the bill was put in.

When Congress voted the Hatch Act into law, it really voted into law some 3,000 independent administrative rulings. As a result, Hatch Act restrictions are sometimes contradictory, they are often confusing, and frequently almost nonsensical.

Let me give a couple of examples that came out in our hearings last year. For instance, under present law, a Federal or a postal worker is allowed to wear a campaign button on the job and attend a political rally. At the same time, however, the employee cannot wave a poster at that rally or stuff envelopes for a candidate at night. He or she can attend the party convention as an observer but not as a delegate.

A Federal civil servant can put a political poster on the family car if it is no larger than 15 inches by 30 inches. If the employee decides to place that same card, that same poster, in his or her yard, however, that is illegal, because the sign in the yard can be no larger than 14 by 22 inches. Now, does that make sense?

A Federal worker may express an opinion about a candidate publicly but cannot, "campaign for or against a candidate." The fine line on this one became a serious issue in the State of Washington during the last election—this is not historical "way back when," this is current type stuff—when Navy shipyard workers were notified that they could not actively participate in the State's presidential caucuses without violating the Hatch Act.

Now, there are hundreds of more examples of this, many of which were brought out at our hearings. And let me say that I have changed my views. I was a big supporter of the Hatch Act until some of these things started coming out, and I switched. I decided that we really did need a change in the Hatch Act. This is not a repeal of the Hatch Act, as it has been termed by some people. It is modification of it—amendments. That is what it is termed.

Some of these examples of rulings might be humorous if they were not so offensive to fundamental political freedoms granted by the U.S. Constitution. In fact, according to testimony presented before the Government Affairs Committee last year, the Hatch Act's complicated web of political restrictions has a dissuasive effect on political participation that goes beyond current-law restrictions themselves.

According to that testimony, the Hatch Act in its present form serves to chill even legal forms of political participation by creating a presumption against political activity. Today 2½ million Federal and postal employees are prohibited from participating in a broad range of political activities, and discouraged from taking part in others.

It just seems terribly unfair to prevent these Americans from the same political rights that other Americans enjoy. Is some protection still needed? Of course, absolutely, and I agree with that. And I believe this legislation strikes the necessary balance between safeguarding the integrity of a nonpartisan Civil Service and protecting against political corruption on the one hand, and protecting the rights of all Americans to participate in the Nation's political process on the other.

It strikes this balance by drawing a clear distinction between political activity on the job and political activity off the job on an employee's own time. Under the bill, on-the-job politicking is disallowed, without exception, while Federal civilian and postal employees are freed to engage in a much wider range of political activities off the job. Significant restrictions on off-the-job politicking, including current law prohibitions on soliciting campaign contributions from the general public, are kept intact.

S. 135 is not a wholesale repeal of the Hatch Act, as some would suggest. Rather, it is a modest attempt to address a serious injustice, and I hope today's hearing will shed some light on this important matter.

As witnesses today we have with us today Senator McConnell from Kentucky; Ms. Constance Berry Newman, the new Director of the Office of Personnel Management; Edward G. Dennis, Acting Deputy Attorney General; Mary Wieseman, Special Counsel, Office of Special Counsel; Vince Sombrotto, President and Chairman of the FAIR coalition, and President of the National Association of Letter Carriers; and Moe Biller, President of the American Postal Workers Union.

Senator DeConcini had planned to testify before the Committee today, but he had a situation where he had to attend an Appropriations Committee meeting this morning and needed to be over there instead. He has asked that his hearing statement be made part of the record, and without objection it will be included in the record.[1]

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[1] See p. 153.

Senator Kohl's opening statement will be included in the record at this time and Senator Levin has also submitted a statement for the record, although he may be here a little later.

[The opening statements of Senators Kohl and Levin follow:]

OPENING STATEMENT OF SENATOR KOHL

I am pleased to be here this morning to hear testimony on legislation introduced by our Chairman, Senator Glenn, to reform and clarify the Hatch Act. I might add that I'm proud to be a cosponsor of this legislation, which is badly needed and long overdue.

Since coming to the Senate last January, I have met with numerous federal and postal employees from Wisconsin, as well as many of their national representatives here in Washington. In every meeting, federal employees have told me about the confusing and often contradictory regulations under the Hatch Act, and the need for reform and clarification. They've explained their frustration with the Hatch rules, under which they can attend a political rally, but can't actively participate. They can donate $1,000 to a candidate, but they can't spend a few hours stuffing envelopes at home in the evening.

It seems to me that in the process of trying to protect federal employees from undue coercion by politically-motivated superiors, we have punished the victims rather than the offenders. The average federal employee cannot exercise many of our most cherished democratic freedoms during off-duty hours. At the same time, top-level presidential appointees—who *are* in a position to wield substantial power—remain unfettered by Hatch restrictions.

Similarly, a NASA employee cannot distribute campaign materials for a partisan candidate on the weekend, while a co-worker employed by a NASA contractor is free to run for office. Both employees perform the same work, sit in the same office, and are ultimately paid by the federal government, yet vastly different rules apply in each case.

I recently learned that farmers in Wisconsin who spend only one or two days a month serving on a county advisory committee to the Farmers Home Administration may be "hatched", according to the Department of Agriculture. This news would probably come as a surprise to many of these so-called federal employees, who might be paid as little as *$21 a month* to help the FmHA make programmatic decisions in their country or region.

Clearly, the time has come for Hatch Act reform. Conditions which originally led to enactment of the Hatch Act have changed, and federal employees should no longer be denied the right to participate in our nation's political system. S. 135 strikes a careful balance between preserving the nonpartisan implementation of our Nation's laws, while allowing millions of deserving federal employees the right to take part in our democratic society.

OPENING STATEMENT OF SENATOR LEVIN

Today the Committee is considering legislation which seeks to modify the current restrictions on political activity by Federal employees. These restrictions, enacted 50 years ago as the Hatch Act, were an attempt to protect the public trust by guarding against the politicization of the federal workforce and to thereby preserve its impartial character. This is a laudable goal and one with which I agree. However, the specific restrictions in place under the current Hatch Act are in some aspects excessive, inconsistent, and confusing.

For example, under the current law, many activities are prohibited which I believe would not in any way compromise the integrity of the Civil Service or appear to the public as a breach of proper conduct by federal employees. Clerks, secretaries, and computer operators are currently not allowed to stuff envelopes, work on Get-Out-The-Vote initiatives, or otherwise volunteer their free off-duty time to become more involved in the democratic process. Such a prohibition doesn't make much sense.

On the other hand, there are restrictions on political activity by Federal employees which are appropriate and necessary. Those restrictions which guard against the appearance or existence of coercion or possible favoritism are vital. Our goal should be to create an atmosphere in which the political and free speech rights of public employees are honored, not an atmosphere in which public employees are pressured into political activity or are compromised in any way.

I believe that modifications such as those included in S. 135, the legislation before us today, strike an appropriate balance between the need to retain the impartiality and special character of the Federal workforce while allowing civil servants to actively participate in the democratic process. I am a cosponsor of S. 135, and I commend Chairman Glenn and Senators DeConcini, Pryor, and Stevens for its introduction.

Chairman GLENN. I would like to thank all of you for coming. I look forward to hearing the testimony this morning.

Senator Roth?

Senator ROTH. Thank you, Mr. Chairman. I have a statement of Senator Stevens who, likewise, could not stay today.

Chairman GLENN. Without objection it will be included in the record.

[The statement of Senator Stevens follows:]

OPENING STATEMENT OF SENATOR STEVENS

Thank you, Mr. Chairman. Unfortunately, I have to leave shortly for an Appropriations Committee markup.

The bill we are discussing today would reform the Hatch Act—not repeal the Hatch Act. We are talking about relaxing some restrictions so that our federal civil servants can participate more fully in the political process, a right taken for granted by most Americans. We are talking about fairness.

The legislation we have before us today is identical to language which was reported from this committee during the last congress. I supported that bill in 1988 and I continue to support the bill now.

Under the Senate bill, federal employees would be allowed to participate in political activities while off duty and away from the worksite. This involvement could include handing out brochures, putting up yard signs, helping with telephone banks, and other functions commonplace to most Americans.

The Senate bill differs from the House-passed bill in that federal employees cannot run for any partisan political office at any level. The Senate bill also restricts solicitation and acceptance of political contributions to a fellow member of the same employee organization for that organization's multicandidate political action committee. Again, only while both employees are off duty and away from the worksite.

That is not to say that there isn't room for compromise. It is my hope that, given time, there can be productive discussions among all parties involved about some relaxation of some restrictions for some federal employees.

Opponents of reform are concentrating on Hatch Act restrictions which would be relaxed under S. 135 and the dire consequences which might result. I would like to take the time to remind my colleagues of the restrictions which remain in place under the Senate bill:

Federal employees could not engage in any political activity while on duty, while in a federal building, while wearing a uniform or official insignia, or while using a government vehicle.

Federal employees could not run for partisan political office at any level of government.

Federal employees could not solicit political contributions from the general public.

Federal employees could not give a political contribution to someone in order to encourage that person to vote, or not to vote.

Federal employees could not give, solicit, or accept a contribution from a federal building.

In addition, federal employees could not wear political buttons—something they are now allowed to.

The federal workforce in 1939 needed the protections of the Hatch Act restrictions. Civil servants were being coerced into participating and contributing to political campaigns out of fear for their jobs. I believe that today's federal employees are much more aware of the civil and criminal penalties which have been enacted to protect them. Violations would still be subject to fines, imprisonment, or both as provided in title 18 of the United States Code:

Coercion for the purpose of interfering with another person's right to vote would result in a maximum penalty of a $1,000 fine, one year in prison, or both.

A federal employee who uses his official authority for the purpose of affecting the nomination or election of a candidate for national office faces a maximum penalty of a $1,000 fine, one year in prison, or both.

Federal employees cannot give a political contribution in order to encourage someone to vote, or not to vote—a willful violation could result in a $10,000 fine, two years in prison, or both.

The promise or special consideration for employment, position, compensation, contract, appointment, or other benefit to any person in return for any political activity carries with it a maximum penalty of a $10,000 fine, one year in prison, or both.

The discharge, promotion, or degrading in rank of any employee for giving, withholding, or neglecting to make a political contribution is punishable by a fine of up to $5,000, three years in prison, or both.

Mr. Chairman, I believe the Senate bill is a balance between protecting the impartial administration and enforcement of Federal Laws and the advancement of federal civil service based solely on merit—a laudable concern expressed by the Department of Justice—and the basic constitutional right of all Americans to participate in their country's political process.

OPENING STATEMENT OF SENATOR ROTH

Senator Roth. Mr. Chairman, as you well know, I have very strong reservations about this legislation. The Hatch Act protection serves every civil servant day after day. And moreover, these protections serve to provide neutral, nonpartisan Government service, which is a right of American citizens in their relationship with the Government.

In 1976 a bill similar to that now pending was vetoed by President Ford, and his veto message President Ford said that if legislation like this became law, "pressure could be brought to bear on Federal employees in extremely subtle ways beyond the reach of any anti-coercion statute so that they would inevitably feel compelled to engage in partisan political activity."

Well, that statement sums up this debate. I don't believe that proponents are able to refute President Ford's conclusion. Some suggest that the Merit System protects the Federal employees so well that the Hatch Act is no longer necessary. And that suggestion is much like the notion that because we are entering a period of relative peace throughout the world we no longer need a strong defense.

Both suggestions reverse cause and effect. Just as it is a strong defense that fostered peace, so, too, it is the Hatch Act that maintains the Merit System. Its purpose and function for 50 years has been to ensure that Civil Service is based solely on merit and not on politics.

I have some additional concerns. Public identification of Federal employees with partisan politics would erode public trust in the Government. The resulting politically active workforce would erode public confidence in Government. In addition, as brought up in the hearings last year, the legislation would permit a workforce with sensitive responsibilities such as law enforcement, tax collection, and the awarding of Government contracts, to become overtly politicized.

Last year the Committee received a letter from the Chairman of the Federal Election Commission urging that an exception be drawn for employees of that agency. The legislation does not address this point, and I will be interested to hear what the witnesses would have to say about that today.

In 1987 the Senior Executive Association published a survey of their members. More than 70 percent of the members who responded to this survey favored the current law. But what is even more revealing is some of the comments made by the respondents:

> The additional freedom in exercising rights of citizens would quickly turn into political favoritism with different sets of senior executive careerists and GS careerists in or out of favor, depending on election results.
>
> The bill could be very harmful for professionals in the career service. Incoming appointees would be under great pressure to award those who worked the hardest for the party that won.

For anyone who doubts a return to the spoils system, I urge them to listen to these Federal employees. The Hatch Act protects them now. The Hatch Act reflects the historical and continuing necessity to balance the right of Federal employees as citizens with the overwhelming public interest in an impartial, politically neutral, and independent Civil Service.

The changes being proposed harm that balance.

Mr. Chairman, I welcome our witnesses. I would like to submit for the record some additional statements from organizations that are not testifying today, and I shall read and listen to what our witnesses say. I look forward to their testimony.

Chairman GLENN. Without objection, those statements will be included in the record.[1]

Senator Lieberman?

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Thank you, Mr. Chairman, Senator Roth.

I appreciate the opportunity to speak for a few moments. I apologize for not being able to stay for the duration of the hearing, but I am a member of the Hastings Impeachment Trial Committee.

I do have a statement for the record which I ask to be included.

Chairman GLENN. Without objection it will be included.

Senator LIEBERMAN. In lieu of that, if I just may say a few words. The statements of my distinguished colleague from Delaware are strong, and I say with some respect that I feel equally strongly on the other side. It is a twist of fate and a coincidence that more years ago than I would probably care to remember, in my third year at law school, we were all asked to do a paper on a constitutional question. I have forgotten whether it was my selection on whether I was given this topic by the professor, but I wrote the paper on the Hatch Act. The more I got into it, the more angry I got and, needless to say, I concluded that it was blatantly unconstitutional, which is a prerogative of law students.

But I continue to have that feeling these many years later. The First Amendment political freedoms that the Constitution conveys are at the heart of what makes our system of Government different. That is axiomatic. Those are the kinds of lines that we all speak on the 4th of July and other such occasions. And yet here we have deprived a substantial number of American citizens of those rights without, in my opinion, just cause.

If there is a problem that we are worried about, which I presume is the politicization of the Civil Service, surely there are more sophisticated, more targeted ways to get at that problem than to simply wave our hands—or wave this law—and by virtue of that act to deprive millions of Americans of their full rights of citizenship and political freedom.

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[1] The statements referred to start on p. 180.

In fact, our laws today prohibit most of the specific problems—acts of coercion, misuse of public trust—that concern us. And to continue to have this blanket prohibition seems to me to be extremely unfair, not just to the millions of public employees who are limited by it, and not just to our country insofar as we become less free than we mean to be, but also to all of us who live in communities where civil servants could contribute mightily to the well-being of our communities.

Why should an employee of a Federal agency who lives in a Virginia or Maryland community be deprived of the right to serve on the local town council or board of education of those communities? Why should the citizens of those communities be deprived of the benefits of the service of this group of people, who happen to be uniquely sensitive to public issues, informed, and committed to public service?

I personally believe that the time has come when we should repeal the Hatch Act totally. Some of the Hatch Act rules to which Chairman Glenn referred—signs that can be held and signs that cannot be held, possible and impermissible contributions and lawn signs and bumper stickers—these sound more like election regulations in Nicaragua or Cuba or China or the Soviet Union, not the United States of America. I am embarrassed by them, and I think we all should be embarrassed by them.

So, Mr. Chairman, quite frankly, I think S. 135 doesn't go far enough. I think it doesn't go far enough because it still prohibits public employees from running for public office. But I understand that progress in this area, as in many others, will come in steps. And in that sense, I appreciate the contents of S. 135 and I hope that we can join together on a bipartisan basis to take this step forward.

It would certainly be a thrill for this former law school student to play some small part in changing this obviously unconstitutional law.

Thank you, Mr. Chairman.

Chairman **Glenn**. Thank you, Senator Lieberman.

[Senator Lieberman's prepared statement follows:]

STATEMENT OF SENATOR LIEBERMAN

Today this Committee considers legislation, developed on a bipartisan basis, to amend Hatch Act provisions that restrict the political activities of Federal civil servants and postal employees. Mr. Chairman, I want to commend you and your staff for holding this hearing and moving this important legislation.

The Hatch Act strips Federal employees of one of the most fundamental rights of our society—the right to participate in the political process. This is not only unfair to those who work for the government, who have every right to engage in political activity, provided they do so on their own time and with their own resources. It is also unfair and damaging to the body politic. Our political system depends on popular participation, and yet we preclude the participation of the large and growing public sector. Ultimately, excluding whole segments of the population from the political process will weaken our system of government.

Even if one agreed with basic premise of the Hatch Act, it is clear that the Act has failed to establish a clear, rational system for regulating the political activities of Federal and postal employees. On the contrary, the Act places vague and often arbitrary restrictions on political activity, enforced by a confusing amalgamation of thousands of administrative rulings. Last year's hearings brought attention to some of these arcane rulings, such as the restraints on the size of political signs that a "Hatched" worker can put on his front lawn or car. Does it make any sense that a Federal Employee can lawfully display a 15-inch by 30-inch political sign on his car, but the same size sign is unlawful if it is displayed on his lawn, and holding any size sign at a political rally is unlawful?

Plainly, the time has come for Hatch Act reform. In 1939, when the Act was passed, the development of a professional civil service was being threatened by patronage appointments, and there were legitimate concerns that some civil servants might put partisan interests ahead of national concerns. Today, however, despite occasional problems, circumstances have changed. Our professional civil service is well established, and we no longer need to straightjacket our Federal workers.

The bill before this Committee proposes moderate changes in the law. S. 135 would remove the most stringent prohibitions on political activities by Federal and postal employees, allowing them to participate in political campaigns if they so choose. Truckdrivers, nurses, janitors, postal workers, secretaries and mechanics will no longer be excluded from exercising their political rights simply because they are Federal or postal workers.

Under the bill before us, "Hatched" employees would be allowed to undertake political activity only on their own time; they would not be allowed to engage in any political activities on the job. The bill would also prohibit Federal employees from engaging in political activity while wearing any uniform or insignia that identifies them as a Federal or postal worker. In addition, they would still be barred from soliciting campaign contributions from the public at large.

Quite frankly, Mr. Chairman, I think the bill before us leaves too many restrictions on Federal workers in place, particularly the prohibition on running for partisan elective office. But I realize that many people are concerned that sweeping changes in the Act might pose a threat to our civil service system. They believe we should move slowly in changing the law. S. 135 does just that. It strikes a balance between the need to preserve an independent civil service system and the need to protect the rights of Federal and postal workers under the Constitution.

I hope the testimony that the Committee receives today will help build a record that establishes the need for the type of Hatch Act reform embodied in S. 135. The bill has my full support, and I intend to work to secure its enactment.

Chairman GLENN. Our first witness this morning is the Honorable Mitch McConnell.

Senator HEINZ. Mr. Chairman?

Chairman GLENN. Oh, I didn't see Senator Heinz come in.

Senator HEINZ. Mr. Chairman, I apologize. I came in right as Senator Lieberman was finishing his statement.

Chairman GLENN. I'm sorry, I didn't see you come in. If Senator McConnell will cease and desist temporarily, we will hear from Senator Heinz.

Senator HEINZ. I thank you, Mr. Chairman, and Senator McConnell.

First, let me ask unanimous consent, Mr. Chairman, my entire statement be a part of the record.

Chairman GLENN. Without objection it will be included in the record.

OPENING STATEMENT OF SENATOR HEINZ

Senator HEINZ. Mr. Chairman, I just want to commend you on holding these hearings. I share your interest and concerns regarding the political rights of our Federal employees. It is for that reason that I am a cosponsor of S. 135. I just want to relate one true story that I think you will find of some interest.

In Erie, Pennsylvania, the wife of a letter carrier—obviously the husband is under the Hatch Act—decided she wanted to run for city council. Her first instinct was to use a picture of herself with her husband. You know, we often picture ourselves with our wives. She started to make inquiries to be sure that if she used a picture of her husband, a Federal employee, it would not contravene the Hatch Act. The information that she got was such that she was told the safest thing she could do would be to leave him out of the photo. Her marital status became an issue in the campaign and she lost.

It is for that reason, Mr. Chairman—plus many others, that we really do need to overhaul the Hatch Act. We are now imposing constraints on Americans who have just as much right to participate in uncoerced political activities as anybody else, that includes them and their families. It is my hope that the legislation that we have introduced, S. 135, will do the job.

If there are some improvements to be made in the legislation, well and good. I think we all want freedom of political expression, but we want to avoid totally any coercion in the workplace, whether that comes from employers or anybody else. I am convinced this is not a task that is beyond our means.

Thank you, Mr. Chairman.

[Senator Heinz' prepared statement follows:]

STATEMENT OF SENATOR HEINZ

Mr. Chairman, I want to thank you for holding this hearing on Hatch Act reform. I share your interest and concerns about the political rights of our Federal employees and I am proud to be a cosponsor of the legislation before us.

Congress should encourage and support the free, uncoerced participation of all Americans in our political process including the men and women who make government work, those who are most directly affected by the restrictions of the Hatch Act.

We should be concerned about the political rights of Federal employees. With over 3,000 separate administrative rulings about what kinds of political activities are permissible or not many of my constituents simply do not understand the complex restrictions upon them. Federal employees may only use a bumper stricker of certain dimensions, and a yard sign in the front yard can only be so large. If it is in the back yard, however, that's another case entirely!

Mr. Chairman, as you well know there are 2.5 million federal employees covered by the Hatch Act and in the Commonwealth of Pennsylvania, there are over 130,000 that serve in various agencies. I remember the story of one of my constituents—the wife of a letter carrier—who wanted to run for city council in Erie, Pennsylvania. The woman wanted to use a family photograph in her campaign literature but the picture included her husband.

After making efforts to learn if using it would be allowed or not under the Hatch Act she was told that the safest thing was not to include him. As a result, her marital status became an issue in the election. I would certainly like to know how public policy is advanced through strict regulation of the off duty, private lives of the men and women at the post office.

The civilian Federal workforce of today is much different than that of fifty years ago when the Hatch Act was implemented. The spoils system that once permeated it is gone and today nearly 80 percent of all Federal civilian jobs are covered by the impartial system of merit and examination. Given these characteristics, there is no reason why we should not extend to Federal workers the same political freedoms civilian employees enjoy as long as protection against coercion is maintained.

Mr. Chairman, this Senator is certainly pleased to continue working with this committee to address the problems of the Hatch Act. They are essentially problems of free speech and political participation. The reforms before us properly address these while ensuring the highest possible level of confidence and trust in Federal employees.

Thank you, Mr. Chairman, for an opportunity to see that we move toward that very goal.

Chairman GLENN. Thank you, Senator Heinz.
Senator McConnell?

TESTIMONY OF HON. MITCH McCONNELL, U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator MCCONNELL. Thank you, Mr. Chairman. You mentioned Senator DeConcini's difficulties. I, too, am sandwiched between a markup in one committee and a business meeting in another. I appreciate, nevertheless, the opportunity to be here and testify on a matter that I think is extremely important—the legislation to amend the Hatch Act's restrictions against political activity by Federal employees.

Much of what we discuss today has been the subject of debate since the founding of the Republic. Many of the same problems that troubled Thomas Jefferson and led, in turn, to the passage of the Hatch Act in 1939 still cause concern today.

The Commonwealth of Kentucky is well acquainted with the dangers attendant to a partisan workforce. The Works Progress Administration brought thousands of desperately needed jobs to Depression-era Kentucky. However, Thomas Stokes' Pulitzer Prize winning series of articles revealed corruption surrounding WPA's activities in Kentucky. As those articles and a later Senate investigation documented, some WPA supervisors coerced contributions from Federal employees and relief workers to the 1938 Senate reelection campaign of Senator Alben W. Barkley of Kentucky, who later went on to Vice President of the United States. Thus, it is with a sense of historical perspective that I bring, Mr. Chairman, my objections.

Some argue that the time for a WPA-type scandal has passed and that the vigilance of the press and the Federal employee unions can replace the Hatch Act's protections. However, as problems at HUD demonstrate, even a scandal of this magnitude can escape notice for quite some time.

I understand and appreciate the desires of some Federal employees to play a more active role in politics. Nevertheless, I believe that it is these very employees who ultimately would suffer the greatest harm if the Hatch Act's protections were gutted.

The Supreme Court has twice—I would say to my friend Senator Lieberman, who had to leave—the Supreme Court has twice ruled that the Hatch Act's restrictions do not unduly burden a Federal employee's First Amendment rights. On both occasions, the Court upheld the Hatch Act, holding that the Act's restrictions on partisan activity are a constitutionally permissible choice given the important governmental interest of assuring fair and effective government and an impartial execution of the laws.

Proponents of amending the Hatch Act claim that both bills provide ample protection against coercion. However, in testimony before this Committee last year, OPM's Director, the Special Counsel to the Merit Systems Protection Board, and the Deputy Assistant Attorney General of the Criminal Division all testified to their lack of confidence in this legislation's proffered protections, saying that "[T]his legislation would almost certainly result in the unprecedented politicization of the Federal Civil Service."

If the very officials who would be charged with enforcing post-Hatch Act restrictions lack confidence in these proposals, shouldn't we reconsider before opening the floodgates to partisan activity?

Another argument that has been made in favor of amending the Hatch Act is that its provisions are so confusing that it serves as a barrier to political expression by Federal employees; and certainly, Senator Heinz just mentioned an example of that.

Personally, I find the list of permissible and prohibited activities found in the Code of Federal Regulations to be somewhat clear and concise, when you consider other Federal standards. Nevertheless, I do appreciate that enforcement of the Hatch Act has created some confusion. Any time the Federal Government undertakes to regulate a field of this magnitude, some confusion is bound to follow. A classic example of this confusion is the fact that a larger political sign—and the Chairman made reference to this—a larger political sign can be placed on a Federal employee's car than in his or her yard.

If the boundaries are uneven, then by all means we should provide clarity. However, I simply cannot understand the argument that the boundaries themselves should be tossed to the wind—nearly anything could go—merely to provide a clearer rule.

If there is any confusion lingering among Federal employees as to what they can and cannot do, then we should take steps to ensure that they are fully and adequately educated as to their rights. The Office of the Special Counsel of the Merit Systems Protection Board has a well-designed series of pamphlets and posters geared toward this end. The Office of the Special Counsel also stands ready to issue advisory opinions upon request. The Federal employee and postal workers unions can also do more to educate their memberships.

Through the Hatch Act's protections we have created the delicate balance between Federal employees' First Amendment rights and the American people's interest in having an orderly Government administration by a nonpartisan work force. I believe that we disrupt this delicate balance only at our great peril.

Mr. Chairman, I hope that the Committee will reconsider passing this legislation. I appreciate greatly the opportunity to hop in here at the beginning and make my statement, and I must go on to another committee. But I appreciate very much the chance to be here.

Chairman GLENN. Thank you. Just a couple of questions very rapidly here to bring out a particular point. Well, the first thing I would like to say, and I want to stress, these are amendments, these are not replacements of the Hatch Act. We are not doing away with the Hatch Act. What we are trying to do is clean up some of the confusion that all of us can agree—whether proponents or opponents of reform legislation is wrong.

Let me just ask a couple of questions. Do you think any changes to the existing Hatch Act are in order?

Senator MCCONNELL. I would prefer not to do that. I would hope that we could clear up some of the—I am not an expert in this field, but I would hope that we could clear up some of the ambiguities with regulations and rulings. If it requires legislation to make it less burdensome, particularly the sign incident that both you and I referred to, then I think we ought to do it.

But, Mr. Chairman, I am reluctant to see the wholesale changes that I think are being made here. I do not think that that would be in the best interest of the Government.

Chairman GLENN. I would submit that the rules and regulations, the way they have been written through the years, are what have gotten us into this mess and to improve it by that same route, I think, is a pretty big order.

There are literally thousands of these regs and rulings that have made the mess we're in.

Senator MCCONNELL. Well, Mr. Chairman, let me just interject on that point though. You are talking about a bill that would allow employees to hold office in a political party, distribute campaign literature and solicit votes, organize and participate in phone banks, organize and participate in political meetings, publicly endorse candidates and urge others to support them, solicit contributions to the PAC of a Federal employee organization.

It seems to me that is a fairly sweeping modification, it is not just a minor tinkering.

Chairman GLENN. No, we differentiate between on-the-job and off-the-job political activity which is very important.

Let me ask this, do you have any idea how many farmers across the country, or in the State of Kentucky, are Hatched and may be violating the law without even knowing it?

Senator MCCONNELL. No, I don't, Mr. Chairman.

Chairman GLENN. Well, farmers across the country who are members of Farmer Home Administration County Committees are currently Hatched, according to the Department of Agriculture. And I don't think you favor that, and I do not either. And because they meet maybe—they are full time farmers—a day or so each month on these committees they are Hatched. What is the logic behind banning these farmers from participating in political activities?

Senator MCCONNELL. Well, Mr. Chairman, I could suggest you might solve that problem without going as far as all the changes that I just enumerated a few minutes ago.

Chairman GLENN. Well, how would you change it? That is what we are trying to do, to clean up things like this where people are being dealt with very unfairly. As I understand it, many farmers are intermittent Federal employees. In the winter they may earn a little bit of extra money when things are slow on the farm by plowing snow at the nearby military base, even Fort Knox or someplace like that. And under current law, these farmers are Federal employees and they are Hatched. When they go back to farming in the summertime they are still Hatched for the rest of that year because they were in fact a Federal employee for a short period of time. Now, is that fair?

Senator MCCONNELL. Mr. Chairman, I might say, I represent a State which has—in terms of the numbers of people who consider themselves farmers—we are number 3 in the Nation. I am also on the Agriculture Committee, and I have never received a single complaint from a farmer in Kentucky on the matter that you raise.

Now, it could be that there is a vast reservoir of resentment out there among farmers in Kentucky about this restriction, but I sure have never heard any of them.

Chairman GLENN. No, I don't think there is any vast reservoir of complaint out there waiting to burst upon us one of these days, but it is just one of the inequities of the Hatch Act that I point out.

Let me give you just one other example. We have a lot of consultants and contractors working full time for the Government. Do we think they should remain un-Hatched? They sit there side by side with Federal employees, do the same work, they are just under contract from the outside. The Federal employee doing exactly the same work is Hatched, the contract worker is un-Hatched and he or she can do whatever they want. Now, is that right?

Senator MCCONNELL. I would suggest to you, Mr. Chairman, as I said before, that you might be able to solve some of these problems without the wholesale revisions that I see embodied in S. 135. It seems to me it goes far beyond that.

Chairman GLENN. Well, I think you perhaps read more into this than we intended or than it actually says.

Anyway, those are the things that we were trying to clean up, or things like this.

Senator MCCONNELL. Yes.

Chairman GLENN. I know you have another meeting here and unless you had something else you wanted to say, we will get on with it.

Senator MCCONNELL. Thanks for the opportunity to be here.

Chairman GLENN. On Panel 2 today we will first hear from the Bush Administration's witness, Ms. Connie Newman. Ms. Newman was just confirmed as Director of OPM last month, Office of Personnel Management, but she has a long history of working on Civil Service issues. Her experience includes a stint as a research analyst with the National Commission on Political Activity of Government Personnel, a commission which examined the Hatch Act in great detail.

Then the next witness will be Mr. Edward Dennis, who has worked for the Department of Justice since 1973. He served as the Chief of the Narcotics and Dangerous Drug section, as U.S. Attorney for the Eastern District of Pennsylvania, as Assistant Attorney General of the Criminal Division, and in his current capacity as Acting Deputy Attorney General. We welcome both of you.

And after Mr. Dennis testifies, the Committee will then hear from Special Counsel, Mary Wieseman. Ms. Wieseman was appointed Special Counsel in 1986 and now heads up the Office of Special Counsel, which was just separated from the Merit Systems Protection Board by the Whistle Blower Protection Act of 1989.

Before being appointed to the Office of Special Counsel, Ms. Wieseman served as the Inspector General as the SBA, Small Business Administration.

I know you have lengthy statements. If they could be summarized, we could get to our questions. If you prefer to give them full length, that will be your choice.

We are glad to welcome you this morning, Ms. Newman, if you will lead off, please.

TESTIMONY OF CONSTANCE BERRY NEWMAN, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

Ms. NEWMAN. Mr. Chairman, I am pleased to be able to appear before you today to discuss the views of the Administration on S. 135, the Hatch Act Reform Amendments of 1989.

Three fundamental principles must govern the conduct of the Nation's business by the civil service. The first principle is that the administration of all laws must be in the public interest and must be nonpartisan; the second principle is that the selection and advancement of personnel must be based on merit; and the third principle is that Federal employees must be protected against any form of coercion for political purposes. Any action that threatens conformance with those principles cannot be tolerated.

As you know and have indicated earlier, the Hatch Act grew out of the abuse of Federal employees during both the 1936 and 1938 elections. Government employees were forced to change their party registrations. Instead of working in the public interest, many Federal employees on the Government payroll devoted official time to pernicious political activity. Patronage was the order of the day, not only in terms of employment but in terms of the allocation of Federal dollars.

Although the Pendleton Act created the Merit System, and although that was on the books, and President Theodore Roosevelt had banned employees from engaging in political campaigns, there were insufficient protections against making the Federal public service highly political. Hence, there was the need for legislation to virtually prohibit all employees of the executive branch from engaging in the active management of political campaigns.

The Hatch Act, with its prohibitions against the solicitation of political contributions, the political use of influence or authority, and coercion of Federal employees to contribute to a political fund or render political service, has, in fact, provided employees with necessary protections. Having had 50 years under the Hatch Act, we as a Nation still believe we need these kinds of protections against major types of pernicious political activities, such as those I have just described.

The Administration believes that S. 135 would not preserve the fundamental principles I mentioned at the beginning of my statement. Allowing Federal employees to hold office in a political party would constitute the abandonment of the historical position of the executive branch that the civil service must be politically neutral. This type of partisan political involvement would lead to public identification of Federal employees with partisan causes and issues and thereby undermine public confidence in the independence and integrity of the Federal civil service.

The other activity which presents significant problems is the solicitation of contributions for partisan purposes. The potential for coercion is immense, with the likelihood of fostering competition for advancement based on financial or other support of a particular party or candidate. The pressures would be obvious, but the penalty for nonparticipation would be more subtle—a lowering of a performance appraisal or a failure to promote. In summary, many of the concerns that led to the passage of the Hatch Act are still valid, and the integrity of the Hatch Act, we believe, must be kept intact.

Many of the concerns expressed regarding the Hatch Act relate to the multiplicity of rulings and their interpretation. The Special Counsel has testified on previous occasions that in her experience there is little evidence of confusion. However, to the extent that clarification of the Act's requirements is needed, we are committed to working with the Special Counsel and the Department of Justice in providing any assistance we can. If we decide that clarification would be helpful, this can be accomplished, of course, administratively and without legislation.

As we are all aware, some Federal employee organizations are strongly pressing for substantial change in the Hatch Act. This Administration and groups of Federal managers have been opposed to liberalization. What we do not know, however, is where the vast majority of Federal employees stand on the issue.

We believe, therefore, that before Congress gives further consideration to statutory changes in the protections provided by the Hatch Act, the desirability of such changes from the standpoint of Federal employees should first be determined.

That is the end of my statement. I would be pleased to answer any questions.

Chairman GLENN. Thank you, Ms. Newman. First we will hear from Mr. Dennis and Ms. Wieseman.

Mr. Dennis?

TESTIMONY OF EDWARD S.G. DENNIS, JR., DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE [1]

Mr. DENNIS. Thank you, Mr. Chairman. I would like to thank you for the opportunity for the Department of Justice to comment on the Hatch Act Reform Amendments of 1989. The Department opposes in the strongest terms this legislation in that it would reduce the current restrictions on partisan political activity by Federal civil servants.

In fact, senior advisors to the President would recommend a veto of this bill if it were presented to the President. I know that the Attorney General feels very strongly about the current Hatch Act, he is firmly in support of it, and would oppose vigorously a repeal of its provisions.

Our opposition is grounded in the firm belief that it is impossible to allow active partisan campaigning by the vast majority of Federal employees and at the same time protect two fundamental principles central to the operations of the Executive Branch of the Federal Government. First, the nonpartisan administration and enforcement of Federal laws; and second, the advancement in the Federal Civil Service based solely on merit.

If enacted, S. 135 would repeal substantial portions of the Hatch Act which forbid certain acts of partisan political activities on the part of Federal employees and certain state employees whose positions are funded by Federal grants.

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[1] See p. 61 for Mr. Dennis' prepared statement.

We believe that such a course would be a serious mistake because we remain convinced that it would result in the tragic re-politicization of the Federal Civil Service to the detriment of the vast majority of Federal employees, as well as to the public policies and programs that they implement.

Thus, in turn, it would seriously jeopardize public confidence in Government and increase demands on already overburdened prosecutorial resources.

The Hatch Act itself, in terms of what it permits Federal workers to do and what it prohibits Federal workers to do has been already commented on by Senator McConnell. We believe that S. 135 is in fact a virtual repeal of the Hatch Act as it currently stands.

The Hatch Act, of course, has had a long history—it is over 50 years old—but the concerns that brought the Hatch Act into being really were voiced in its earliest form by Thomas Jefferson, who observed that "The right of any officer to give his vote at election as a qualified citizen is not meant to be restrained. However, it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it."

I would point out that this statement by Jefferson fairly close to the enactment of our Constitution certainly recognizes many of the pragmatic concerns that in our history were borne out. Of course, the Civil Service was created in 1871 with Congress authorizing the President to establish a true Civil Service of Federal employees. And the Civil Service Act of 1883, known as the Pendleton Act, had one provision, called Rule 1, which declared that "No person in the public service is for that reason under any obligation to contribute to any political fund or to render any right to use his official authority or influence to coerce the political action of any person or body."

And subsequently there were amendments to Rule 1, one in 1907 that was promulgated or advanced by President Theodore Roosevelt. Of course, as a result of the elections in 1936 and 1938, Congress eventually prohibited partisan political activities on the part of Federal employees, and that was the beginning of the Hatch Act, which was named after Senator Carl Hatch, a Democrat from New Mexico.

That Act has served us well. And in fact, we have, I think, as a matter of our own experience, erected certain insulation for Federal employees from political influence; one, has been the establishment of the Civil Service; two, has been the Hatch Act; and three, have been certain specific criminal law enforcement provisions which make it a crime to solicit funds from a Federal employee—prohibiting certain Federal officials from soliciting funds from Federal employees. And, in fact, a prohibition against contributions be made to Federal officials by employees that work under their authority.

The Supreme Court of the United States has, of course, recognized not only the constitutionality of the Hatch Act, but it has also recognized the purposes for which the Hatch Act was enacted as being significant. In *United Public Workers of America* v. *Mitchell* the Court stated, "Congress recognizes the danger to the Civil

Service and the political rather than official effort may be channeled through political connections".

And finally, *Civil Service Commission* v. *National Association of Letter Carriers*—in fact a case that didn't involve the Postal Service—the Supreme Court noted that neither the right to associate, nor the right to participate in political activities is absolute. But it went on to state that Congress was justified in concluding that substantial barriers should be raised against the party in power, or the party out of power, for that matter, using the thousands or hundreds of thousands of Federal employees, paid for at public expense, to man its political structure and political campaigns.

We believe that the changes proposed in S. 135 would invite an unacceptably dangerous degree of politicization in the Federal workplace. The types of conduct involved would run the gamut from informal political commentary to outright pressure on subordinates to volunteer to help in campaigns or contribute to an election fund.

I would note that insofar as the Department of Justice's efforts are concerned to deal with criminal activities in this regard, that these cases are extremely difficult to make for many practical reasons, and therefore that the criminal process should not be relied upon as being an adequate guard against abuses should the Hatch Act be repealed.

The development of factually significant cases in this area suffers from two major problems. The first problem lies in the fact that individual victims of patronage schemes rarely come forward, either because the victims agree with the politics of the person pressuring them, or are a part of the same political machinery, or because the relative cost of submission at an individual level is low. In other words, a $50 contribution, or perhaps a few hours on a Saturday or a Sunday, or even during work, stuffing envelopes.

The second major problem that the Department encounters is the fact that in order to prosecute these cases successfully, you must have someone coming forward who is willing to take the risk, and the political threats to be prosecuted must be made in somewhat unambiguous terms because our proof is beyond a reasonable doubt.

Usually the type of coercion that is in place in situations where you don't have the protections of the Hatch Act involve very subtle coercion. The prosecutor must therefore attempt to identify additional witnesses who can testify that they also received similar "threats" from the identified suspect.

This can be extremely difficult and particularly where an individual who might be willing to come forward is concerned that by exposing these subtle pressures that he or she might lose their job.

We have submitted to the Committee in a letter a number of concrete examples of cases that we feel represent the kinds of activities which would be accelerated should the Hatch Act be repealed.

The Department of Justice remains convinced that nothing short of an absolute bar on active partisan political activities by Federal Civil Service employees will adequately protect the public's interest in fair and impartial administration of Government programs and policies, and the employees, themselves, from more or less subtle pressures from their superiors.

Finally, I would like to speak on my own behalf and not now as a representative of the Administration. As was noted, Mr. Chairman, in relating my background, I have been since law school a member of the Federal Civil Service. I started out as an Assistant U.S. Attorney. I was in excepted service for 5 years. I joined the SES, Senior Executive Service, in 1980, was under that system for 3 years, and for the last 6 years, of course, I have been a Presidential appointee.

But as someone who has spent his life in Federal service, I think I can say, at least in terms of my own experience, that the absence of any partisan coercion insofar as my carrying out my duties I consider to be a great benefit. I do not feel that the environment within which I have been able to work would have been possible if I had to make choices or be concerned about the partisan implications of my actions. And therefore, certainly on a personal level as well as representing the Administration, I think I can say without equivocation that a repeal of the Hatch Act would be a substantial tragedy for the Federal Service and not a step forward.

Thank you very much, Mr. Chairman.

Chairman GLENN. Thank you, Mr. Dennis.

Ms. Wieseman is from the Office of Special Counsel.

Ms. Wieseman?

TESTIMONY OF MARY F. WIESEMAN, SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL [1]

Ms. WIESEMAN. Thank you, Mr. Chairman. Before my prepared remarks, I would like just to respond to a couple of remarks that were made concerning regulations of the Hatch Act. As the Committee knows, the Office of Special Counsel is required to give advisory opinions to Federal employees with regard to the restrictions and prohibitions of the Hatch Act.

I want to say on the record today that there is no regulation that sets the number of inches of any sign that a Federal employee may or may not put on their car or on a front lawn; that the woman in Erie, Pennsylvania was not advised by our office that she could not have her husband in the picture. In fact, that would not be prohibited by the Hatch Act and we were never asked the question.

With regard to the farmers, Mr. Chairman, if they were intermittent employees they are only covered by the Hatch Act during the 24 hour period when they were in the Federal Service, not the rest of the time.

So if I might, I would go on to my prepared remarks, just having gotten that on the record.

Chairman GLENN. I think that is fine. I just want to respond by saying, then why has the Department of Agriculture ruled differently?

Ms. WIESEMAN. Well, they didn't come to us. I wish people would come to us, Mr. Chairman. We can tell them what the Act says and interpret it for them.

Chairman GLENN. That is what we are trying to clear up—things just like this where people have not come to you.

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[1] See p. 92 for Ms. Wieseman's prepared statement.

Ms. **Wieseman**. Thank you. Thank you for inviting me to testify on behalf of the Office of Special Counsel on S. 135, the Hatch Act Reform Amendments of 1989. I have already submitted a prepared statement to the Committee, and rather than reading it in its entirety, I ask that it be included in the record.

Chairman **Glenn**. It will be included in the record in its entirety.

Ms. **Wieseman**. Thank you. In formulating my views on S. 135, I have been guided by the belief that the primary mission of the Office of Special Counsel is the protection of Federal employees from prohibited personnel practices, along with the protection of the Merit System.

The OSC has been responsible for enforcement of the Hatch Act provisions relating to political activities of Federal employees and certain state and local government employees since enactment of the Civil Service Reform Act in 1978.

In my opinion, enactment of S. 135 encouraging active involvement in partisan political activities by Federal employees to an extent not seen in over 80 years would undermine protections currently available to them and adversely affect the integrity of the Merit System. Passage of this bill, in my view, would lead inevitably to the intrusion of partisan politics into the Federal workplace in direct and indirect ways, including both overt and subtle forms of coercion. It would also lead to the erosion of confidence in the integrity of governmental decision making and processes and in the efficient delivery of governmental benefits and services.

Concerns over subtle political coercion resonate for me when I consider the recent prosecutions by my office of numerous state officials in two different States for political coercion of subordinate state employees. Since congress loosened the prohibitions on political activities by state and local employees, they are permitted by law to actively participate in partisan political campaigns and organizations.

The coercion of these employees in one case only came to our attention when a courageous former employee blew the whistle on this corruption of power. When the OSC investigators first arrived on the scene they were met with considerable reticence. Only through the persistence of OSC investigators and attorneys and the compulsion of subpoenas were we able to overcome witnesses' fear of coming forward against their bosses.

The investigations in both of these cases uncovered numerous incidents of political coercion of substantial sums of money and services from many subordinate employees who came to believe that their submission to supervisors direct and indirect blandishments was the built-in price for selection, job rewards and job security.

Allegations of political coercion by state employees in other jurisdictions have also surfaced recently in connection with investigations by the Office of Special Counsel and other law enforcement agencies. The investigative and prosecutive experience of the Office of Special Counsel and other agencies at the State and local level gives me no reason to believe that Federal workers will be effectively insulated from political coercion and reprisal once the restrictions on active, partisan political activity are removed.

Notwithstanding the contrary intentions of skilled, well-meaning legislative drafters, I question whether Federal employees and the

Merit System as a whole should, absent compelling circumstances, be subject to these types of additional direct or indirect pressure points on the loyalties and energy of the Government workforce.

Strong concerns have also been expressed to my office by many Federal employees directly affected by potential loosening of the Hatch Act protections. Today's hearing is yet another in a continuing series of Congressional efforts to reassess the balance struck by a succession of presidents and the Congress, and upheld by the Supreme Court, between employee rights and vital public interests.

After earnest consideration, the arguments for and against the dramatic changes in the Hatch Act principles that would be effected by S. 135, I have concluded that I cannot support the changes proposed because they would so fundamentally recast a law that has served so long and so well to protect the vast majority of Government employees and to preserve important public values.

There can be little question at this point that the restrictions on active involvement in partisan political activities by Government employees, which have evolved over a period of 200 years, reflect judgments shared by all three branches of Government; that no public employee should be penalized for his or her political beliefs or used as the political minion of the party in or out of power; that personal merit rather than political allegiance should be the basis for selection, promotion, ratings, awards and other incidents of employment; that Government employees should make and implement public policy and programs consistent with the law and not a political party agenda; that integrity and impartiality in the discharge of official duties should be safeguarded; and that the public should be held secure in the knowledge that Government employees are public servants in every sense of that term.

Among my concerns with S. 135 is that even with the strongest of controls against coercion of political activity by Government employees, it seems unrealistic to believe that they will be oblivious to the advantages of political partisanship when competing for promotions, training, or other employment benefits with other politically active employees.

Overt coercion is difficult enough by itself to guard against and detect. More subtle forms of coercion are almost impossible to regulate, especially when they arise in a climate in which the unspoken assumption is that political conformity is the route to achievement and security. Such a climate leads inexorably to subtle, self-imposed pressures on employees to conform, or appear to conform, to whatever political tendency will assure greater job security.

Much has been said about the chilling effect of the Hatch Act on employees' freedoms, including claims that employees censor their on conduct to such an extent that they refrain from engaging in even permissible political activities.

I respectfully submit, if history is any guide, that the reverse would likely be true if the Hatch Act were revised to permit partisan political activity. That is, employees would feel the need to engage in partisan political activity that they would not have undertaken otherwise, so that what would be permitted under a reformed Hatch Act would be seen to be advisable, or even required, to win or maintain the favor of a politically active hierarchy in the workplace.

I believe that the existence of the Hatch Act restrictions on partisan political activity has created a climate in which the opportunities for coercion and political discrimination are far fewer than they would be without such restrictions.

An additional concern is the effect of a Federal workforce actively engaged again in partisan politics on public perceptions of governmental integrity. Ought we to be thinking in terms of legislative action that would tend to increase public skepticism about the integrity of Government employees and operations based on partisan political influence? Is it realistic to think that we can achieve a politically active yet impartial and objective Government workforce? Will it be possible for the public to view the activities of any Government worker engaged in partisan politics with full confidence that the employee's undivided loyalty is to the public as a whole without regard to the agenda and policies of a political party?

Hatch Act principles have been so much a part of the fabric of our public life for so long that I think it can fairly be said that this country has evolved a tradition of a nonpartisan, neutral public service, a tradition that was born out of past abuses and corruption of the Merit System.

In closing, I believe that the Hatch Act represents a judicious balance between important and historic values and has served this country, Federal employees, and the Merit System well while permitting Government workers latitude in expressing their political opinions and in pursuing permissible political activities.

I am extremely concerned that S. 135 would upset that delicate balance in ways that will have serious consequences on Government employees, the Merit System, and public confidence in the integrity of the Government as a whole. For all these reasons, I do not support enactment of this measure.

I would be happy to answer any questions.

Chairman **Glenn**. Thank you very much. We will use a 5 minute questioning period since we have several members here this morning.

Just in response to your remarks about the Department of Agriculture, here are the instructions to members of the Farmer's Home Administration County Committees. It says, under "Political Activity: Members cannot hold office in a political club or political organization such as a precinct committee or be active in the affairs of such political club or organization." Period. It says nothing about time on the job.

In the OSC instruction book, it says what you said a little while ago, under a question, "Does the law apply to part-time employees or to temporary employees? Yes, it applies to both. Intermittent or occasional employees, however, are covered only during the 24 hour period of any day in which they are actually employed."

Now, it is my understanding, further, that one of the States right now has a court case where a group of farmers has sued to be exempted from what they see as a restriction by FHA. Are you prepared to go to court and testify on their behalf?

Ms. **Wieseman**. Well, I am not familiar with all of the facts, Mr. Chairman, We haven't, as far as I know, been asked this particular question. Our booklet says, specifically page 8, that intermittent employees are covered by the Hatch Act only during the 24 hour period that they are actually in the Federal Service.

Now, if a person is holding a position in a political party or organization, whether that person could resign during the 24 hour period when he is a Federal employee, I don't know. And I don't know all the facts of this case. That may be the issue.

Chairman GLENN. Okay. Ms. Newman, in 1969 you served as a research assistant for the Commission on Political Activity of Government Personnel. That was a bipartisan, independent commission that recommended very significant reform of the Hatch Act. Among other things, the Commission found that the Act is overly restrictive in terms of the political activity which it proscribes and that the Hatch Act's some 3,000 individual administrative rulings create confusion among Federal employees and the restrictions are often ambiguous and in need of clarification.

Now, it was sometime ago, but when that report was issued did you agree with its recommendations?

Ms. NEWMAN. At the time the report was written, I was concentrating primarily on the Hatch Act at the various State level. I did at that time believe that there were confusions as a result of the over 3,000 rulings that came from the Civil Service Commission. And, as a matter of fact, even today I have offered that to the extent that there is confusion in the regulations, we are prepared to address that administratively.

I have not changed my view on the need for clarity and will do everything in the power of the Office of Personnel Management to bring that about.

Chairman GLENN. We will talk about clarity in a little while here. But in testimony you delivered before this Committee during your confirmation hearing, you supported the principle of—and I quote your word—"rationalizing" the Hatch Act.

That is basically what we have tried to do with this legislation—making a clear distinction between on-the-job politicking, which is expressly prohibited, and political activity off the job, which is allowed, still with some restrictions.

Do you think that on-the-job/off-the-job distinction is good rationalizing, a good basis for rationalizing the Hatch Act?

Ms. NEWMAN. Well, Mr. Chairman, I think we can probably talk for a long time about what I might mean by rationalizing and what others might mean. As a matter of fact, in my written answer to the question prior to the confirmation, I did say that I believed in the rationale for the Hatch Act. I continue to believe in the rationale for the Hatch Act, and I believe that civil service employees need to be protected.

So that in my talking about rationalizing, I think even at that time I was as concerned about ensuring that there is not unnecessary confusion and that there be the proper balancing between protection of the individual rights and the Government operating in the public interest. And I said at that time that there still needed to be protections to ensure against political reprisals.

Chairman GLENN. There is such an enormous misunderstanding of things, and you said at your confirmation hearing, very correctly, "At the very least there should be steps taken to simplify, consolidate and reduce the confusion created by the present statute."

Do you think we can make this whole thing substantially more clear, more comprehensible, without a legislative overhaul? What we are trying to do is take all these 3,000 points of confusion and straighten some of them out.

Do you think you can do it administratively without legislation?

Ms. **Newman**. Yes, I do think in working with the Office of Special Counsel and the Department of Justice, to the extent that it is important to inform people—continue to inform people—that when they need advisory opinions that they go to the Office of Special Counsel. And maybe we need a greater publication of the decisions so that the confusions don't exist.

I personally believe that administratively much of what I hear as examples of problems can be handled.

Chairman **Glenn**. My 5 minutes are up on this first round.

Senator Roth?

Senator **Roth**. Mr. Dennis, I think it is worthwhile emphasizing some of the points you made in your testimony.

As you pointed out, going back to the days of Thomas Jefferson, there has been concern about partisan political activity on the part of the Federal employees. And it was Mr Jefferson who said—and I think it bears repeating, speaking of the Federal employees—"will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it."

Since one of our members in his opening statement raised this question of constitutionality, I think it is important to reemphasize that twice—not once but twice—the Supreme Court has ruled that the Hatch Act is constitutional.

Let me ask you, going back to this question of rationalizing. Do we all agree that with 3,000 different rules and regulations that there is a need to try to go through these rules and regulations and rationalize them in some manner, with or without Congressional action; would anyone disagree with that?

Ms. **Wieseman**. If I may respond, Mr. Chairman—Senator Roth.

Senator **Roth**. In the good old days. [Laughter.]

Ms. **Wieseman**. The 3,000 regulations that are talked about were the 3,000 rulings of the Civil Service Commission prior to 1939 that were incorporated by statute into the Act. Subsequent to that, the Civil Service Commission first, and the Office of Personnel Management later have issued regulations which currently are on 4 pages of the Code of Federal Regulations.

There are 13 permissible activities identified, 16 impermissible activities identified in the Office of Personnel Management regulations that the Supreme Court looked at in the *Letter Carriers* case and said that they were reasonably clear.

Now, there is no question that language can be changed if there is a particular concern and, in fact, we have recommended some changes of the regulations to the Office of Personnel Management.

Senator **Roth**. Well, just let me interrupt because it seems to me, I don't care what agency or what department, and I am not being critical. But when you have 3,000 regulations issued of a period of time, to me it just makes some good common sense that there be a pretty careful going over.

So that I feel very strongly that that is one step that should be taken. We really ought to take a careful look under current circumstances.

But let me go back to this idea. Now, the purpose of the Hatch Act was, of course, two-fold; one was to protect the employee, and two was to ensure the American public that the Government would act in an impartial and nonpartisan manner.

Now, in the case of protecting the employees, there was sort of a quid pro quo. In return for not involving in significant partisan action, if I can call it that, the job was protected. The idea was to do away with the spoils system.

Now, what we see here is an effort to do away with the prohibition of partisan action, but to try to, nevertheless, protect the employee from partisan discrimination. Now, if I understand your testimony, Mr. Dennis—and I would like to ask you, Ms. Newman—isn't one of the concerns that if you open it up to partisan activity, as a matter of fact you are going to find that there will be partisan pressure put upon the Federal employee in the discharge of his duties?

Mr. DENNIS. Absolutely. In fact, Senator Hatch made that statement that it is impossible, really, to separate the two. The Hatch Act itself, in its being such a blanket prohibition, I think was a recognition of the very practical realities of Government and Government service; that you really must make a blanket prohibition or else it just is unworkable. And I think that that is a matter of record in terms of the Congressional history of the Hatch Act.

Senator ROTH. Ms. Newman?

Ms. NEWMAN. And it is the Administration's position that under S. 135 there is not the sufficient protection against partisan activity and that the kinds of concerns that led to the Hatch Act are not protected under this legislation.

Senator ROTH. My time is up, Mr. Chairman. I have some additional questions.

Chairman GLENN. Senator Kohl?

Senator KOHL. I want to ask an opinion, if 75 or 85 percent of these Federal employees were Republicans, do you think we would be here today arguing the same question?

Ms. NEWMAN. It would not change my position, Senator.

Senator KOHL. It would not?

Ms. NEWMAN. No.

Senator KOHL. I just have the feeling that maybe we are talking politics here instead of principle, to some extent. You know, I just wonder whether or not that is part of what is happening here.

We have 2½ million people today who are Hatched and we are living in a country where a huge problem is the lack of participation in the political process. Oftentimes people in Civil Service, Government employees, are among the most well educated and sophisticated people in our society.

It would seem to me that we should be trying to bend over backwards to find a way to encourage their participation.

What is your reaction, Ms. Newman?

Ms. NEWMAN. I think that your observation about who makes up the public service is correct and the concern always, though, is the proper balancing of the individual rights of the people that you speak of and Government operating in the public interest. And what is happening is we have a difference on where that balance is and where it should be.

To the extent that the public interest is protected through the kinds of activities that are now available, I think there is a comfort level. I do not know how comforting it would be to the public if that balance changes.

Senator KOHL. Mr. Dennis?

Mr. DENNIS. Senator Kohl, I believe that it is important that we encourage the broadest participation in the political process by all concerned. But I recognize that for those of us who serve in public service, that our way of making a contribution is to do our jobs to the best of our ability and with the greatest fidelity to those that we serve.

I have recognized in my own career the fact that there are certain limitations. There is a certain price that I had to pay to be an Assistant United States Attorney and to do that work. I accepted those restrictions and I feel that I have made my contribution in that way.

If I chose to make it in another way in terms of either running for elective office, or "electioneering," as Thomas Jefferson put it, then my option would be to leave Federal Service as an employee and to pursue that avenue.

You know, you may regret the fact that you cannot do both, but I think that those restrictions serve a substantial public interest and that they should remain in place.

Senator KOHL. Well, it would seem to me that only under the most extreme circumstances should we be looking for ways to limit the participation of people in public life, and I do not believe that just because a person occupies a position of employment by the Government that this is an extreme circumstance in a democracy.

Mr. DENNIS. Well, there is just, obviously, a difference in terms of the policy implications and the results. The Hatch Act is a pragmatic piece of legislation. I mean, it is not a broad constitutional principle. But I think that what it does is, it provides a legislative structure within which I think our constitutional principles can be most effectively advanced.

And that is to separate the Civil Service from the partisan political end so that those that are in power can be assured that they have a group of workers who are going to serve that interest and be faithful to the particular party that is in power to make sure that those policies are carried out. And with that, you won't have confusion with regard to their loyalties or allegiances, and, as well, that they can be assured, those that are in the employ of the Government, that they can do their jobs, whether it be a matter of protecting the environment, whether it be a matter of regulating the nuclear industry, that they can focus in on those interests without being affected by partisan political concerns.

Senator KOHL. One other question.

Ms. Wieseman, today employees cannot actively participate. They cannot volunteer to stuff envelopes. However, they can contribute $1,000 to a candidate so he or she can pay someone else to stuff those envelopes. The someone that a candidate can pay to stuff envelopes can be the same employee who is prohibited from volunteering if that employee happens to have an envelope stuffing business on the side.

Ms. WIESEMAN. Well, I think you just touched on, Senator, that there are a broad range of permissible political activities available to Federal employees. They, of course, may vote. They may contribute money to political parties. They may attend political activities. So there is a broad range of political activities that is available to Federal employees.

They are restricted in active campaigning and electioneering, and that is the balance that was struck by the Congress in 1939. That is the balance, I think, that protects from my viewpoint, the Federal employee from the coercion that would inevitably occur if the restrictions were lifted.

Senator KOHL. Thank you. Thank you, Mr. Chairman.

Senator ROTH. Mr. Chairman, if I might just make a comment. I thought 75 percent of the Federal employees were Republicans and that I was protecting them. [Laughter.]

Chairman GLENN. Rightly or wrongly. Senator Levin?

Senator LEVIN. I think at certain levels of classifications you may be right.

Why is it okay to go to a rally but not okay to invite your neighbor to go to the rally with you?

Ms. WIESEMAN. You could invite your neighbor to go to a rally with you.

Senator LEVIN. You can? Could you give your neighbor a piece of paper saying there is a rally tomorrow?

Ms. WIESEMAN. Senator, since the last time we had this colloquy at the last hearing, I am sure you are aware that the courts have ruled on some of the issues that we discussed at that time. In our discussions last time, we were talking about the number of letters that might be written to a newspaper, et cetera.

Senator LEVIN. With regard to the rally question, can you give your neighbor a brochure saying there is a rally tomorrow?

Ms. WIESEMAN. What the court said in the *Biller, Blaylock and Sombrotto* case in interpreting the Hatch Act—and, of course, the courts are the ones who make the final interpretation of what the Hatch Act prohibits, we try to give that information to Federal employees, but the courts are the ones that make that determination—is that expression by Federal employees of political opinions is unrestricted by the Hatch Act so long as that expression is not in concert with or in connection with or on behalf of partisan candidates of campaigns. That is what the court said, and that is a new interpretation of the Act.

We are in the process of applying those broad principles to particular factual situations. That is our job. We have revised our Hatch Act booklet—it is at the printer—to make those points. So I think it would be——

Senator LEVIN. What is the booklet going to tell us about my question?

Ms. WIESEMAN. Pardon me?

Senator LEVIN. What is that booklet that is at the printer going to answer to my question?

Ms. WIESEMAN. It is going to talk about the broad principles that I just iterated about the in concert——

Senator LEVIN. My fact situation.

Ms. WIESEMAN. If it is in concert with—as the court said—if it is in connection with, on behalf of, or in concert with a political party or campaign, it is prohibited by the Hatch Act. That is the criteria that the courts set up, the 2nd Circuit and the 11th Circuit. That is what we are interpreting.

Senator LEVIN. Now, my question is, I can invite my neighbor to the rally orally but I cannot hand the brochure, or I can hand the brochure?

Ms. WIESEMAN. If it is in concert with, on behalf of or in connection with—that is what the court said—a partisan political campaign or activity, it is prohibited. If it is not, it is permissible.

Senator LEVIN. Either oral or in writing?

Ms. WIESEMAN. Yes.

Senator LEVIN. So that whether I can invite my neighbor, or cannot invite my neighbor orally to that rally may depend upon my intent?

Ms. WIESEMAN. The only thing I can say, Senator, is what the court said. And we are dealing with factual situations every day in this area. We have to tell the employees, you may partake in this activity if you are not doing it in concert with, in connection with, or on behalf of a partisan political campaign or candidate. And those are the court's words and that is what we are interpreting and telling Federal employees currently.

Senator LEVIN. Did the Administration argue against that decision by that court?

Ms. WIESEMAN. The case was argued by the Merit Systems Protection Board. They have litigating authority. It was an action brought by my predecessor, and the Board found that there was a violation of the Hatch Act in that factual circumstance. And the case was argued in the appeals courts by the Merit Systems Protection Board attorneys.

Senator LEVIN. Let me just address, then, the Attorney General's Office, the Department of Justice.

It seems to me what we have done here, basically, is—you used the phrase, I believe, Mr. Dennis, that we need a blanket prohibition. We don't have a blanket prohibition. We have got a piece of Swiss cheese, basically, with the most complicated dos and don'ts that are conceivable.

You can put a bumper sticker on your car but you cannot give a bumper sticker to your neighbor if it is—what are the words?

Ms. WIESEMAN. You can give the bumper sticker unless it is in concert with, in connection with, or——

Senator LEVIN. What was the second word? In concert with or what?

Ms. WIESEMAN. On behalf of.

Senator LEVIN. Behalf of. So——

Ms. WIESEMAN. You cannot campaign for——

Senator LEVIN. I understand.

Ms. WIESEMAN [continuing]. A political party.

Senator LEVIN. I understand. I can put a bumper sticker on my car, wear a button, but I cannot give a bumper sticker to my neighbor if I am doing that on behalf of a campaign. I cannot go and stuff envelopes in a campaign office.

Mr. DENNIS. That is right.

Senator LEVIN. Nobody cares about whether or not a Federal employee goes and stuffs envelopes in a campaign office.

Mr. DENNIS. I don't think that is true, Senator Levin.

Senator LEVIN. Do you mean if you took a poll of the American people, you think that 20 percent of the American people would object to a Federal employee, without any public interface, going down to a campaign office and stuffing envelopes, or stuffing envelopes in his or her home?

Mr. DENNIS. It really depends upon the employee.

Senator LEVIN. Let's take a letter carrier. Forget that, not stuffing envelopes. Take a clerk at the Veterans Administration stuffing envelopes in his or her own home.

Mr. DENNIS. They probably would not care. If it is an Assistant United States Attorney who is working on a case that might involve political corruption, yes, they would care quite a bit, I am sure. In fact, it would probably be on the front page of the newspaper.

Senator LEVIN. I think that is true, but you used the term "blanket prohibition," and all I am telling you is there is no blanket prohibition right now. We have got some dos and don'ts that are incredibly complicated. It is a matter of drawing the line, and what we have done is draw the line in a place which prohibits employees from doing ordinary activities in a campaign to which the public does not object.

The public would object if an IRS agent goes into a business and says, I would like for you to give me some money for this particular candidate. The public would object to that. There is some pressure involved in that. There is a public interface that they would resent. They would resent, perhaps, if their letter carrier knocked on their door and said, can you give me 5 bucks for this candidate. They might object to that.

They do not object to the ordinary run of activities which are still going to be prohibited under the Administration's approach to this bill. And it seems to me what we have done in this bill is to try to separate out those activities which are non-objectionable.

As Senator Kohl said, we ought to restrict the number of times that we limit Federal employees from exercising their constitutional rights to those activities which are objectionable for some reason. But we have got an absolutely willy-nilly, I believe arbitrary prohibition on Federal employees from carrying out activities to which nobody objects to. No one cares whether or not a Federal employee sends to his 10 friends an invitation to go to a rally. They do not care. They just simply do not object to it, because it is unobjectionable, there is no coercion.

What we have done is turned a statute that was aimed at protecting Federal employees from retaliation into a statute which discriminates against employees in their most basic rights. That is what we have done. And what bothers me—and I will finish, because my red light is on—what troubles me about it is that we have done it without an adequate public purpose to do it. We have talked about blanket prohibitions and you do not want Federal employees engaging in partisan activities, but the truth of the matter is we do draw a line right now. We say in your booklet what is allowed and what is not allowed, so we do allow some activities.

All I am suggesting to you is that, rather than talk in generalities, that we focus on specific activities, as this bill does, and tell us what activity in that bill is objectionable, what specific thing that we would allow in this bill is objectionable for any public policy reason, and then we ought to address that particular issue and say is it or isn't it not objectionable.

I would object to a Federal employee soliciting somebody with whom they have contact. I think that puts pressure on the citizen and we should not tolerate it. But I do not object to what we allow in this bill, because I think it is unobjectionable from any public policy perspective. I am way over my time.

Chairman GLENN. All right, Senator Levin. Thank you.

Ms. Newman, when the Hatch Act was enacted 50 years ago, there were some 60 new Federal agencies that had been created. These were the days of the New Deal, the Great Depression, all the things that we are familiar with. Only 5 of those 60 new Federal agencies had been placed under the Civil Service Commission, and the Hatch Act was developed at that time to protect those other 55 agencies in order to prevent them from just being a big patronage cesspool from one administration or another.

But today the situation is reversed; some 78 percent of Federal employees are protected by the Merit System and they are hired and promoted on a competitive basis and they can only be fired for cause. They cannot just be tossed out on a patronage basis. In this day and age, patronage only operates in the case of direct political appointees.

Now, with the Merit System safeguards that we have today, how do you respond to the assertion that the Hatch Act was a response to pressures in the Federal workplace which no longer exist?

Ms. NEWMAN. Mr. Chairman, I think, however, it would be hard to prove that the Merit System is working in and of itself, because the Hatch Act does now exist. I am not sure that if the Hatch Act were removed, that the Merit System would operate as we would want it to operate. That is an honest concern. And one of the points that I made in my remarks that I still believe is necessary is for us to understand from the vast majority of the employees to what extent they believe that the Merit System, without the Hatch Act being in the environment, would suffice.

Chairman GLENN. Well, we have the most senior people who are free to do whatever they want with regard to politics—openly go out and campaign and do whatever they want. Are file clerks and secretaries and other people, the lower level people in the Civil Service ranks, in danger if we allow them the same political rights, as you said?

Ms. NEWMAN. Well, the system does recognize that there are political appointees who come and leave without any protection, they can leave overnight, and that there is another system, that is, the career system, not just file clerks, but it goes all the way up to senior executives, who are the core of the Government, and there is still a belief that it is in the public interest that that core unit of the Government must be protected against political coercion.

Chairman **Glenn**. Because of Congress' inability to deal with its own pay, we have held down other government salaries that are linked by law to Congressional pay. We have been forced to go to much more outside consulting firms, outside contracting, because of our inability to pay high enough government salaries.

Now, many of these consultants and contractors sit there and work full-time for the government, side by side with Civil Service employees. Should they be Hatched?

Ms. **Newman**. To the extent that they are operating and not in the public interest, that maybe is something which needs to be looked at. I am not aware that that is problematic. I am not aware that, because there is a higher percentage of contractors than, say, 10 years ago, that there are major inequities in the public arena. I am just not aware of that.

Chairman **Glenn**. Ms. Wieseman, I would disagree completely with your characterization of S. 135 as being a repeal of the Hatch Act. You use that word repeatedly in your written testimony, and it is not a repeal. It was put in as an amendment. We are not trying to do away with the Hatch Act completely. We are trying to make it more workable and more fair, and I think there is a big difference between repeal and reform.

S. 135 continues current law prohibitions against coercion of political funds and activities, it continues and in some cases actually strengthens penalties for violations of the Hatch Act.

We have another disagreement: According to your testimony, the OSC provides, "basic Hatch Act advice in clear and concise terms." Now, we have "The Political Activity and the Federal Employee," which is the OCS publication reported to explain the Hatch Act. It has a question and answer section in it. Last year, in response to the question, may an employee write a letter to the editor of a local newspaper expressing an opinion on a partisan issue, to that question, the publication read, "In support of a candidate or political party, the employee may neither write one letter or cause it to be distributed to five newspapers, nor may the employee write five consecutive letters to one newspaper."

Now, there is a new edition this year and, while the question has remained the same, the OSC's answer has changed. The publication now reads, "The Hatch Act does not prohibit a Federal employee from writing a letter to the editor of the newspaper expressing the employee's opinion about a partisan candidate. The exact number of letters beyond the first which the law permits has never been determined. While persistent, widespread and voluminous reiteration of the same view on a partisan candidate can take on the character of partisan activity and is evidence of an intent to engage in partisan political activity, the number of letters is not the only criterion for determining if the law has been violated. An employee also violates the law when he or she sends one or more letters as part of an activity organized and directed by a political party or is part of an organized effort that has been directed for or against a political party or the candidates of that party."

Now, can you describe the answer I just read as understandable or concise?

Ms. **Wieseman**. Well, that is not——

Chairman **Glenn**. And this is a clarification.

Ms. **Wieseman**. It is a clarification and it resulted from a review which we do on a daily basis of the advice we are giving, to assure ourselves and to assure the Federal workforce that we are not imposing any restrictions on the Federal employee that are not required by the Hatch Act.

This change in the answer was a response to our view that citing a particular number of letters was not what the Hatch Act prohibits. What the Hatch Act prohibits is writing letters on behalf of a campaign, it is campaigning, it is politicking, it is electioneering, which the Hatch Act prohibits. This is what we are trying to differentiate: expression of an employee's opinion, from campaigning on behalf of a partisan political activity or candidate.

The Supreme Court said there is a limit on the English language in being both precise and clear, and we may have reached it in this answer. We are trying, however, in revising the booklet——

Chairman **Glenn**. In which direction?

Ms. **Wieseman**. Not concise, but we are trying to be as clear as we possibly can and, as I say, our concern is not to mislead or to overstate the non-permissible activities, but to interpret the Hatch Act as the courts and as the Civil Service Commission have interpreted it.

Chairman **Glenn**. I doubt that many Federal employees are going to sleep easier at night after that interpretation of the Act.

Ms. **Wieseman**. I might add also, I think that this interpretation is a lesson in being concise, when one looks at the Internal Revenue regulations or the Ethics in Government Act regulations. There is a difficulty in trying to write language and to interpret congressional enactments which require some length and effort to understand.

However, we are also there to give oral advice, to discuss these kinds of answers with particular employees, with particular factual situations that they want to discuss with us, and we invite them to call or to write to us for that kind of advice.

Chairman **Glenn**. My time is up, but I would only say the only reason why we have developed this legislation is because all of the efforts of the past to explain this in ways to take out all the contradictions, to make some sense out of this, all the efforts of your office and others have failed and that is the only reason we are pushed to this kind of legislative action on this.

The Federal employees do not know what they are doing out there with regard to the Hatch Act, and even the booklet to explain it, as I just pointed out, has its own set of difficulties, and so that is the reason we are pushed into something like this.

Senator Roth?

Senator **Roth**. Ms. Wieseman, I think you made a very significant comment that ought to be again reemphasized, and that is what you are trying to do in your regulations is to distinguish campaigning from individual comment.

Now, with all due respect to the questions and, having gone to law school, of course, it is always a favorite game to take those questions that cut across that line. But is that not essentially what you are trying to do, is you are trying to distinguish campaigning from individual comment?

Ms. **Wieseman**. Absolutely, Senator.

Senator **Roth**. I have no argument with those who urge that we overview and try to simplify, because I think that is worthwhile. But I would also like to—I do not care whether you call it reform or you are revoking the legislation, the fact is that this is making very, very significant changes from the current law.

For example, this proposal would permit one to hold office in political parties, that is not the case now; one could organize and participate in political campaigns and meetings, that is not the law now; one can publicly endorse partisan candidates and urge others to support, that is not the law now; one can raise funds for a PAC of a Federal employee to which both the employee and donors—so, in a very real way, are you not pulling the teeth out of the Hatch Act as it at least exists at this stage? Mr. Dennis?

Mr. **Dennis**. I think so, yes. We view S. 135 as a virtual repeal. I know it is couched in its structure and its title suggests amendments to the Hatch Act, but in our judgment, with those provisions being eliminated that relate to office in a political party and the other very significant election activities that you mentioned would be permitted under S. 135, it eviscerates the Hatch Act to such an extent that we feel it would be an insignificant factor insofar as regulating this very critical area.

Senator **Roth**. And is it not a fact, Ms. Newman, that if you look at the House bill, which permits the employee to run for partisan office, is that not correct?

Ms. **Newman**. Yes.

Senator **Roth**. And to collect money from anyone, and we all know that when you go into conference, you cut down the middle, more or less, so if this legislation is enacted by the Senate and we go to conference with the House, you are even going to go further in the direction of pulling the teeth out of the legislation. Would you agree with that?

Ms. **Newman**. Senator, I do not want to talk about what might happen in conference. I do know that the administration has a problem with both H.R. 20 and S. 135, in terms of not providing the necessary protections, so what will happen in conference, I have no feel for that.

Senator **Roth**. Let me ask you a question about collecting funds for a campaign and the difference between the House and the Senate. Now, in the Senate bill, you can only collect from a PAC to which you belong and the donor belongs. In the House, you can collect from anyone.

Now, if you are arguing that this is inhibiting the right of an individual to exercise his constitutional right to become involved in politics, does that make sense, to limit it to the PAC, or should it be opened all the way?

Mr. **Dennis**. We do not see this as a substantial distinction. We, of course, favor the position that solicitation, whether through a PAC or other device, just should not be permitted.

Currently, the criminal statutes in this context make it very clear that you cannot be solicited by a Federal official to contribute funds. In fact, we find on occasion that, by mistake, some of the computer mailings will come to Federal employees and that sort of thing and we have to open up an investigation, and oftentimes we close it because it is inadvertent, but it is a very—you know, that sort of situation can put quite a bit of pressure on an employee who might feel that his job or his promotion or his assignment to a more attractive post could be affected by it. So, we feel that solicitation of funds itself should be prohibited, both in the context of the PAC arrangement or in the context of someone being solicited on the job with regard to——

Senator ROTH. Does it bother you that a supervisor under either approach could collect funds from a subordinate employee?

Mr. DENNIS. Absolutely. In fact, there are two criminal statutes. One involves just a general solicitation by an official within the Government or election funds. The other involves a prohibition against even making the contribution to a superior. If you are working under the supervision of that individual or within the chain of command, you are prohibited even from making a contribution, even if you were not solicited. Again, I think that is an acknowledgement of the very real pressures that there are, the almost coercive nature of the relationship, that one would not really be exercising a freedom of choice, but would be acting under a sense of coercion based upon the power that that individual as a supervisor potentially had over one's career.

Senator ROTH. I have an additional question, but my time is up.

Chairman GLENN. Senator Kohl?

Senator KOHL. I have for Mr. Dennis an article from the Wall Street Journal, on January 3rd, and it talks about the Bush transition team and it mentions a Mr. James Pinkerton, who has had several prominent government jobs, including a position at the Postal Rate Commission. In this article, Lee Atwater is quoted as referring to Mr. Pinkerton as "his closest intellectual advisor for the last 7 years. Atwater says that Mr. Pinkerton provided "bales of negative campaign research on Governor Dukakis during the campaign." [1] Obviously, this sounds very political. Mr. Pinkerton appears to have advocated partisan positions at the highest level during his tenure as a Federal employee.

My question is, Mr. Dennis, is the Justice Department aware of this and are they looking into this?

Mr. DENNIS. I really cannot advise you, Senator. If I had known when I was going to appear that you would ask me about a specific individual or specific case, I might have been prepared to determine that. Whether I could answer in a public forum is unclear, but I really just have no knowledge.

Senator KOHL. Will you provide an answer for that one for the record? That was the Wall Street Journal article January 3, 1989.

Mr. DENNIS. Okay.

Senator KOHL. Ms. Newman, could you tell us whether or not you have previously supported the need for some reform of the Hatch Act?

Ms. NEWMAN. I served on a commission as a staffer, research staffer. My job at that time was primarily to look at the Hatch Act in the various States—if that is what you are looking for.

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[1] See article referred to on p. 206.

Senator **Kohl**. I had the impression from what I had heard and read that at some point you have felt that some real reform of the Hatch Act was something that——

Ms. **Newman**. I said rationalization of the Hatch Act.

Senator **Kohl**. Okay.

Ms. **Newman**. When I testified at the confirmation hearings, I indicated, both there and in my written answers, that I still believed in the rationale for the Hatch Act, I still felt that those protections were needed, but I did think that there might be a need for rationalization of the Hatch Act.

And then we earlier talked about what I might, as opposed to somebody else, have meant by that, and one thing that I do believe, whether it means that we need to revise our regulations or we need to get more information out in terms of examples, that we do need to make clearer to the employees what they can and cannot do, and we need to do that in connection with the Office of Special Counsel.

Senator **Kohl**. Okay.

Ms. Wieseman, 41 States, including my own State of Wisconsin, have relaxed their so-called mini-Hatch laws, allowing State and local employees greater freedom to participate in politics, and these States have reported no apparent problems in maintaining a nonpartisan public workforce.

In light of these situations in 41 different States, and again considering what our goal should be in a democracy, to give people the greatest opportunity possible to participate, do you not think the Federal Government should take some similar action?

Ms. **Wieseman**. Well, Senator, what I think of are the recent prosecutions that my office has had. They are the first cases of political coercion that we have tried in the 10-year history of the Office of Special Counsel, and they have been tried in the last 2 years, involving two States and numerous State and local employees who were coerced into providing services and money to political parties and to political candidates.

We are investigating other cases where allegations have been made. Therefore, I believe from what I am seeing—and I certainly cannot extrapolate that and I would not extrapolate that to the 50 States, but I do have a concern that there is coercion, at least in the places where we have seen it and that they are not isolated instances, and the Hatch Act is one of the reasons why I think we do not have that problem in the Federal Government.

We have had so few allegations of partisan coercion or partisan decision-making in the personnel area, it is the least prohibited personnel practice that is even alleged, because the climate in the Federal Government created by the Hatch Act, is that the Federal Government workforce is non-partisan. That climate is what I think needs protection and what protects the Federal employee from the kinds of coercions that we see in these two cases and other investigations we are involved in.

Senator **Kohl**. Thank you.

Thank you, Mr. Chairman.

Chairman **Glenn**. Senator Levin?

Senator **Levin**. Is it your agency's job to enforce the Hatch Act as you interpret it?

Ms. WIESEMAN. Well, we give advisory opinions. We are required by the statute to advise Federal employees concerning the Hatch Act. However, if we determine that there has been a violation that warrants prosecution, we bring that case before the Merit Systems Protection Board. It is tried before the Board; we have the burden of proof by proving that there was a violation. The Board makes a decision and that decision is appealable either to a District Court or to the Federal Circuit Court of Appeals.

Senator LEVIN. Now, is it basically your job, then, to take the law as you see it and both give advice about it and to enforce it?

Ms. WIESEMAN. I guess the only quarrel I would have with your statement is "as we see it." We are interpreting it——

Senator LEVIN. As you interpret it.

Ms. WIESEMAN. We are interpreting it with the assistance of the courts, the Board decisions and the Civil Service Commission decisions on what the Act means, and we convey that to the Federal employees.

Senator LEVIN. Is it your job to take formal positions as to amendments of the Hatch Act? If we decide to relax in some respects the Hatch Act to permit certain kinds of limited political activity by Federal employees, is it your job to either object to or support that kind of a congressional change?

Ms. WIESEMAN. Certainly, if there were congressional change, we will enforce the law, no question about that, whatever the law is, we will enforce it.

Senator LEVIN. Do you have a formal position on the provisions of the Senate bill that is in front of us?

Ms. WIESEMAN. In my testimony, I said that I could not support it, Senator.

Senator LEVIN. Are there any provisions of that bill that you support?

Ms. WIESEMAN. Going through line by line, I cannot do that. My overall view of it is that it is a virtual repeal of the Hatch Act and I cannot support that.

Senator LEVIN. The question is, though, are there any provisions of that bill that you could support.

Ms. WIESEMAN. I would not be prepared to mention any at this time, Senator. I do not know of any thing in the bill that I could support.

Senator LEVIN. Ms. Newman, are there any provisions of the bill that you could support?

Ms. NEWMAN. I cannot answer that. I need to go line by line. I have looked it for the purposes of testifying today on the bill in total, and I have not gone back to do the analysis as you suggest.

Senator LEVIN. Mr. Dennis, do you see any differences between the House and the Senate bill?

Mr. DENNIS. I really only reviewed the Senate bill and, of course, I have read descriptions of the House bill for purposes of the differences between it and S. 135. I think that H.R. 20 and S. 135 present the same basic problems. There are some differences in terms of specific provisions, but the thrust of both pieces of legislation would be the virtual repeal of the Hatch Act, and we do not see any valuable provisions that would be worth preserving insofar as legislation is concerned.

Senator Levin. You do not have any preference between the House and the Senate bills?

Mr. Dennis. No, we think both of them present the same problems.

Senator Levin. I hope if we get to conference that that position will be maintained.

Mr. Dennis. I believe it will be.

Senator Levin. That your position will be maintained.

Mr. Dennis. Yes, our position will be maintained.

Senator Levin. The House language, as I read it, says an employee may not solicit, accept or receive a political contribution. Wait a minute—let me read a different provision—may not knowingly give or hand over a political contribution to a superior of the employee. Is that your understanding, you cannot contribute, you cannot give a political contribution to a superior of the employee?

Mr. Dennis. That is the current law, I believe. That violates section 603 of Title 18, I believe, certainly a criminal provision.

Senator Levin. That is section 7324 of House bill 20.

Mr. Dennis. But it adds nothing to the current law, Senator.

Senator Levin. Would that change your answer as to whether or not you could give contributions to your superiors under the House bill? Did you not answer to Senator Roth that you could make contributions to your superior?

Mr. Dennis. No, you cannot, you cannot under current law, you cannot.

Senator Levin. Under the House bill.

Mr. Dennis. Well, under current statutes you would be committing a crime to, in fact, make such contributions.

Senator Levin. Under the House bill.

Mr. Dennis. And under the House bill, if that provision is there, then it certainly tracks what is currently in force.

Senator Levin. I thought you said the House bill would change current law in order that such contributions would be permitted, in response to Senator Roth's question.

Mr. Dennis. Senator Roth was asking about the inimical effect of allowing someone to either make such contributions or to have a superior solicit contributions from a subordinate, and I said that the situation of soliciting contributions from a subordinate by a superior was just—not only was that not to be encouraged, that it violated current criminal law.

Senator Levin. I do not think that was the question. I think it was very clear that Senator Roth was asking you for changes from current law and that you were answering yes, that's bad, that's bad, that's bad, that's bad. One of those changes which he asked about I thought quite clearly was that under the House bill, soliciting from your superior, people you supervise was permitted. Now, maybe I am wrong, but I think I am not.

Mr. Dennis. Well, under that——

Senator Levin. You did not mean to imply, then, that soliciting from people that you supervise would be permitted under the House bill?

Mr. Dennis. In answering that question, I thought I was being asked whether or not that was a good idea, to permit that. I was not focusing on any particular piece of legislation.

Chairman GLENN. We have had several rounds here with this particular panel. I hate to cut this off. I have one more question, Senator Roth said he had one more. Maybe we can limit this next round to just one question each and then we will get a chance to move on. We are going to have to because time is getting away from us.

Ms. Wieseman, I would like to ask you what plans you have to simplify Hatch Act compliance with existing law: how much latitude you have in your office right now to correct these anomalies that we see; are there new rules and regulations you can promote; do you need new legislation to help you do your job?

In other words, if we do nothing, would you be able to straighten this mess out? And it is a mess, we all know that, so can you straighten it out or do we need to help you? That is the reason why we are passing this legislation.

Ms. WIESEMAN. I do not believe we need legislation, Senator, and I would not support legislation. Insofar as there are some ambiguities in the regulations, I think we can work with OPM. OPM issues the regulations under current law. We do work with OPM, we have made some suggestions to OPM with regard to the regulations currently in effect, and I think we can work very well with Ms. Newman and her staff concerning problems with the regulations. I do not think legislation is necessary.

I also would just reiterate at this hearing and publicly that if Federal employees have a question about the Hatch Act, please call or write, we will do our best to obviate any ambiguity in the written statements. I think that is why Congress gave us that advisory opinion function, so that we can deal person-to-person with an employee who has a question.

Chairman GLENN. Senator Roth?

Senator ROTH. One comment, Mr. Chairman, and then I will ask a question. It is my understanding that, as far as presidential appointments are concerned, they are all Hatched except those who are confirmed by the Senate, so that there is a broad exception in the case of presidential appointments.

I would just like to note that there does not seem to be——

Chairman GLENN. Could I just interrupt? Is that correct?

Ms. NEWMAN. Presidential and then there are White House——

Chairman GLENN. Only those subject to confirmation are the ones that are not Hatched?

Ms. NEWMAN. Not Hatched, correct, and there is also——

Ms. WIESEMAN. There is exception also for the White House Office of the President, that exception plus——

Senator ROTH. His official office is an exception, yes.

Ms. WIESEMAN. Yes, not the Executive——

Senator ROTH. Outside of that, it is those that are confirmed.

Mr. WIESEMAN. That is right, all Schedule C's are Hatched, if that is what the Senator was getting at.

Senator ROTH. The other observation I want to make is that there have been several surveys, and I would like to have you confirm whether or not this is your understanding, that show that there is not any overwhelming demand for Hatch reform. In one case, in three of the four surveys that I have been able to find, Federal employees have indicated their opposition to Hatch Act amendments. In the final survey, 33 percent favored the current law, 30 favored reform, and the rest were neutral.

In a Government executive magazine, 3,200 Federal employees were interviewed, 60.6 percent said they opposed reform, 39.4 agreed. The Senior Executive Association, they took a survey, and 74 percent opposed reform, 22 favored, and 4 percent had no opinion.

Finally, in the Federal Employees News Digest, you find them pretty evenly divided: 13 favored, strongly favored, 20 favor, 36 percent are neutral, 19 opposed, and 11 percent strongly opposed. So, is it your impression that there is no overwhelming demand for such reform?

Mr. DENNIS. Senator Roth, I have not reviewed the surveys, but certainly from at least my experience in Federal service, I have not sensed among my colleagues a desire to want to repeal the Hatch Act. Having had to administer it within my own office, being subject to it myself, I do not feel there is as groundswell of support for repealing the Hatch Act.

Senator ROTH. Thank you, Mr. Chairman.

Chairman GLENN. Thank you.

Senator Kohl?

Senator KOHL. With respect to the question that just came up as to who is Hatched and not Hatched, those that are confirmed by the Senate, those appointed by the President and confirmed by the Senate are not Hatched. If this administration's position is that the current Hatch provision should be maintained, would it not make sense to Hatch everybody?

And in answer to your comment about you do not know what the administration's position would be, would you not say that what is good for the goose is good for the gander?

Mr. DENNIS. I do not recall commenting with regard to the administration's position on extending the Hatch Act to employees or to appointees that it currently does not cover. There are certain constitutional limitations with regard to the President's ability to have his policies or her policies—when we have a female President, which we will one day—affected, those—and again, I think it is a practical matter that there have to be up to a certain level partisan supporters of the President in order for him to be able to carry out his duties, so this is a constitutional limitation, one that does not come into play when you are talking about lower-level employees.

In fact, though, even on a voluntary basis, individuals like myself are under substantial restriction, even greater than the Hatch Act, by virtue of the sensitive positions that we hold. The Department of Justice is much more stringent, because we almost have a quasi-judicial function insofar as our criminal law enforcement responsibilities are concerned.

So, on a certain level, judgments have to be made, balancing the President's ability to carry out his duties as President through his Cabinet and through high-level officials, and the need to separate certain officials and certain institutions from partisan influence.

Senator KOHL. Thank you, Mr. Chairman.

Chairman GLENN. Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman.

I really object, Mr. Dennis, to your characterization of this bill as repeal of the Hatch Act.

Mr. **Dennis**. Well, virtual repeal—virtual repeal.

Senator **Levin**. The bill, both in the House and the Senate, contain significant restrictions on activities of employees. In the Senate bill, employees are prohibited from using official authority or influence for the purpose of affecting the result of an election; knowingly soliciting, accepting or receiving a political contribution from any person, with certain very narrow exceptions; employees are prohibited from engaging in political activity while on duty in any room or building occupied in the discharge of official duties, and so forth, while wearing a uniform or official insignia; identifying the office or position of the employee from using any vehicle owned or leased—there are very significant restrictions on employee activity in both the House and the Senate bill, and I for one object to the characterization of either one of these bill as being a repeal, which I think you now used twice, of the Hatch Act.

Mr. **Dennis**. Well, a virtual repeal. All those restrictions as far as I know are currently in place under the Hatch Act and related legislation. And the problem is that the legislation as proposed does not go far enough. I mean it does not go really to the heart of the Hatch Act, it does not really provide any assurances that those abuses that brought the Hatch Act into being would not be resurrected if we were to remove the restrictions that the Hatch Act imposes.

Senator **Levin**. That is legitimate argument to debate, whether or not employees are protected from retaliation under this bill. I think they very clearly are protected from retaliation. I think that is a legitimate argument, whether or not there is adequate protection of employees from retaliation, whether or not these limitations go far enough. But I do not think it is a fair characterization, as has twice been used this morning, of saying this is a repeal of the Hatch Act.

What you really are saying is that you oppose modifications in the Hatch Act. I gather you do, do you not?

Mr. **Dennis**. Well, I do, but——

Senator **Levin**. Then why not say that? Why do you——

Mr. **Dennis**. I do say that, we oppose, we oppose, but it is a virtual repeal of the Hatch Act and that is the reason that we oppose it.

Senator **Levin**. The word "virtual" is a matter of debate and characterization, and I would disagree with you on that. But I believe that you have even left that adjective out twice this morning, and I just have got to tell you, I think that that is a very excessive mischaracterization of these bills which are intended to clarify what activities are permitted and what is prohibited. There is a lot of case law which has come down the pike which we are trying to clarify, which would change the limits in some regard, where there should be no real objection to Federal employees participating, where there is no public interface, where there is no coercion of the public, where I believe the public would say sure, their rights to participate ought to be protected, because they are not impinging on the public. But that is worthy of debate and I think that is legitimate debate, but I have got to say that the exaggerated characterization of these bills by a number of witnesses a number of times as repeal of the Hatch Act, I think is frankly a disservice to clear debate on what we are trying to do.

Mr. **Dennis**. I disagree, Senator. I mean I respectfully disagree, Senator Levin.

Senator **Levin**. That it has been characterized as a repeal?

Mr. **Dennis**. No, I respectfully disagree that, in fact, this is not a repeal of the Hatch Act. It is a virtual repeal of the Hatch Act.

Senator **Levin**. This is not a repeal of the Hatch Act.

Mr. **Dennis**. I disagree with you, Senator Levin, that you seem to believe that this is a mere amendment to the Hatch Act. I disagree with that. This is a repeal. S. 135 is a repeal of the Hatch Act.

Senator **Levin**. Nothing is left of the Hatch Act after S. 135?

Mr. **Dennis**. It is a repeal of the Hatch Act, Senator Levin.

Senator **Levin**. Is there anything left in the Hatch Act after S. 135 passes? All those words that I read do not leave anything left?

Mr. **Dennis**. Senator Levin, the provisions that you pointed to are currently protected, not only in terms of the Hatch Act, but they are protected by criminal statutes that would still be in force, even if the Hatch Act were—even if S. 135 merely said that the Hatch Act is repealed. Those provisions would still be in Federal law under Title 18, and so, therefore, I do not think it really makes the point that you are making, that this is not a repeal of the Hatch Act.

Senator **Levin**. You don't need the word "virtual"?

Mr. **Dennis**. In fact, no, I do not need the word "virtual." It is a repeal of the Hatch Act.

Senator **Levin**. Thank you, Mr. Chairman.

Chairman **Glenn**. I wish we had a couple more hours here. We are going to have to move along, unfortunately. Thank you. We may have additional questions written and sent to you. We would appreciate your response to questions from other members who could not be here.

We have our third panel today. Testifying on the third panel is Vincent Sombrotto, President and Chairman of the Board for Assuring an Independent Retirement, commonly known as FAIR. FAIR is a coalition of 32 Federal and postal employee organizations and associations and has nearly 6 million members who are active or retired postal, Federal or public employees.

Mr. Sombrotto also serves as President of the National Association of Letter Carriers.

Also with Mr. Sombrotto is Mr. Moe Biller, President of the American Postal Workers Union, a group that is also a member of the FAIR coalition.

I would hope that you could summarize any lengthy statements that you may have today. Your entire statements will be included in the record, and gentlemen, we look forward to your testimony.

Mr. Sombrotto, would you start off, please?

TESTIMONY OF VINCENT SOMBROTTO, PRESIDENT AND CHAIRMAN OF THE BOARD, FUND FOR ASSURING AN INDEPENDENT RETIREMENT [FAIR], AND PRESIDENT, NATIONAL ASSOCIATION OF LETTER CARRIERS [AFL–CIO]

Mr. **Sombrotto**. Thank you, Mr. Chairman.

Mr. Chairman, my name is Vincent R. Sombrotto, President of the National Association of Letter Carriers. Today, I am proud to come before you as Chairman of FAIR, a coalition of 32 Federal, Postal and public employee and retired groups representing over 6 million members nationwide. FAIR is comprised of both management and labor representatives.

We thank Chairman Glenn and other members of the Governmental Affairs Committee for your cooperation with FAIR and your leadership in the Senate throughout the fight for increased political freedom for Federal and Postal workers.

As we approach this Committee's consideration of S. 135, Hatch Act Reform, victory is in sight. Companion legislation in the House, H.R. 20, was passed on April 17, 1989, by an overwhelming margin, 297 to 90, 70 Republicans, including Minority Leader Bob Michel, joined the effort. In the Senate, we have 36 cosponsors and commitments from many more. In the 100th Congress, a majority of Senators supported this legislation.

We were somewhat encouraged by what we thought would be a breath of fresh air by the arrival of the new Director of OPM, Constance Newman, because in 1966 she authored a report made by the Commission on Political Activity of Government Personnel, which stated:

"For too long, in this Commission's view, governmental institutions, business, industry and universities have tended to deprive our society of valuable human talent by saying, 'no, you must not participate in politics.' As the Nation's largest employer, the Federal Government should become a model employer, encouraging political participation which does not endanger the public service."

In contrast to the reasoned approach of Director Newman—and that was in 1966, it is somewhat different today—the most vocal opposition to S. 135 has resorted to building support to uphold a presidential veto of the legislation. I have, for the record, material which the National Right to Work Committee mailed. It slanders members of Congress, is misleading and factually incorrect. Moreover, the opposition's reliance on a presidential veto to rescue them from the rising tide of support for Hatch Act reform may well be misplaced. President Bush has not taken a position on S. 135.

Hatch Act reform's political strength is based on the fundamental value of free and unfettered political participation by the citizens of our Nation. When lawmakers act to limit political participation by a segment of the population, such as Federal or Postal employees, they attempt to do so only to protect other compelling State interests and in a manner which is least restrictive of those persons' political freedom.

S. 135 fits the "least restrictive" definition, and there is recent history to prove it. In 1989, we can look at new evidence—experience at the State level, post-1939 laws and dramatic changes in the Civil Service—which demonstrates that less restrictive regulation of Federal employees' political activities would provide employees and the public with safeguards against any potential abuses.

For example—and I add, Senator Roth, in the State of Maryland and the State of Delaware, you have a law, a mini Hatch Act reform, which mirrors and replicates, in my judgment, S. 135. The law in Delaware, for instance, says laws of Delaware do not restrict partisan political activities by State employees during their off-duty hours—which is what S. 135 does. The Delaware Code prohibits a Merit System employee from using his or her official authority to influence the vote or political action of any person, and that is what S. 135 does, and also they may not coerce individuals into making a contribution for political parties. So, what is good for the State of Delaware——

Senator ROTH. I would just comment, Mr. Sombrotto, that many years ago, when I was Republican State Chairman, I fought very actively for a civil service for the State employees. That is before they had any action at all.

Mr. SOMBROTTO. Well, I am just saying, what is good for Delaware ought to be good for the Nation.

Senator ROTH. Normally, I would agree with you.

Mr. SOMBROTTO. For example, when the Hatch Act was adopted in 1939, a minority of Federal jobs were filled by examination. Today, nearly 80 percent of government positions require one to pass a standard exam, thus jobs are filled on objective criteria and not influenced by subjective politics. Moreover, the Merit Systems Protection Board was created in 1978 to protect the Civil Service from political abuse. The Office of Special Counsel conducts examinations and initiates prosecutions of any violations.

In addition, recent Criminal Code changes provide protection not present in 1939. For example, Title 18, section 595, prohibits any person employed by the Federal Government in an administrative capacity from using his official authority for purposes of interfering with, or affecting the nomination or election of certain candidates for national office. Violators are subject to fines and/or one year in prison.

Title 18, section 599 prohibits a candidate from the direct or indirect promise or pledge, or the use of influence, or the appointment of any person for the purpose of securing support for his candidacy. Violators are subject to fines and/or two years in prison.

Title 18, section 600 prohibits promise or special consideration for employment, position, compensation, contract, appointment or other benefits made possible by an Act of Congress to any person in return for any political activity, or support of a candidate or political party. Violators are subject to fines and/or imprisonment.

And Title 18, section 601 prohibits causing any person to make a contribution for the benefit of a candidate or political party through the denial or deprivation of any employment, position, or work within an agency of the Federal Government. Violators face a maximum fine of $10,000 or one year in prison or both.

Mr. Chairman, there are more examples of changes in the legal code, such as civil rights laws and non-discrimination laws, which come to bear. There are also non-systemic changes, such as the media revolution. The media is extremely aware of abuses of official power and acts as a check against them.

We also have experience at the State level, where many jobs parallel Federal positions. As the committee well knows, the Hatch Act was amended in 1975 to permit political activities by State and local government employees. A comprehensive study of 50 State mini-Hatch Act laws clearly demonstrates that State-level reform is working. Forty-one of the 50 States have reformed their laws to permit broader political freedoms for their government employees than those permitted by the Federal law. These States have experienced no coercive activity or improper use of authority. I will submit fact sheets on these 41 State laws.

In sharp contrast to the States' positive experience with reform, the Federal law has proven to be fraught with confusion and complexities. Postal and Federal employees are intimidated and afraid even to participate in politics to the limited extent allowed under current law.

I want to make a point here, Senator Glenn. Director Newman said they had no kind of feeling from the Federal workforce as to whether they would want to see Hatch Act reform, and Senator Roth read some statistical data on some surveys that were taken.

Let me make the Committee aware of the fact that at the National Association of Letter Carriers, I sent out to every active member, some 220,000 of them, a simple, non-biased, non-weighted form to vote yes or no, a simple question, do you support Hatch Act reform, yes or no: 93 percent of the respondents said they supported Hatch Act reform.

I received, interestingly enough, hundreds of cards with indications on them, do I violate the Hatch Act by signing this card and making an indication of whether I want reform or not, so it gives you an idea of where the confusion is. People do not even know whether they can say they would like to support Hatch Act reform or not.

The Hatch Act has spawned over 3,000 regulatory rulings and decisions, many of which are conflicting and most of which no longer make sense. For example, this complex law allows Federal or Postal employees to speak publicly on political subjects, but not at a political gathering; they may attend a political convention, but cannot serve as a delegate; they can sign a nominating petition, but not circulate it; they can place a bumper stick on their car, but they cannot give one to a friend—the inconsistencies go on and on.

We cannot advise our members with confidence, since advisory opinions of the Special Counsel are not subject to judicial review. It is only after employees jeopardize their jobs that a determination is made on whether an activity is permitted under the Hatch Act. Many decisions are not published and so are not readily available, resulting in an inability to ascertain the precise extent of prohibited and protected activities or the penalties involved.

S. 135 provides clarity. Political activity on the clock, on the job site, in uniform is prohibited—no if's, and's or but's. In addition, Federal and Postal employees are prohibited from running for partisan political office or soliciting or receiving political contributions from the general public.

This carefully drafted reform legislation earned the support of a wide spectrum of Federal and Postal organizations, both management and labor, and with the bipartisan committee and Senate support. The bill provides a reasoned approach to a growing American problem, political participation. Passage of your legislation allows 3 million Americans to participate independently in our democratic system of government.

In 1989, we are closer to reform than ever before. We are fortunate to be the ones at center stage in the final enactment of this much needed political reform. I thank the members of the committee for allowing me to testify on behalf of FAIR, and I look forward to working with you to secure Committee, Senate, and administration adoption of Hatch Act Reform.

I will be glad to answer any questions.

Chairman GLENN. Thank you, Mr. Sombrotto.

Mr. Biller?

STATEMENT OF MOE BILLER, PRESIDENT, AMERICAN POSTAL WORKERS UNION, AFL-CIO [1]

Mr. BILLER. Mr. Chairman, members of the committee, my name is Moe Biller, President, American Postal Workers Union, AFL-CIO.

The American Postal Workers Union has been a proponent for changes in the Hatch Act for many, many years. We believe that S. 135 is a workable alternative to the current regulations which become more confusing and vague over the years.

The history of events which led to enactment of the Hatch Act is not in dispute. While I have dealt with these events briefly in my written testimony, I will not belabor them here before the Committee in my oral remarks. However, I feel that it is important to note that the abuses which resulted in the Hatch Act being passed resulted not from voluntary participation by Postal and Federal employees in partisan politics, but from coercion and improper use of official authority by supervisory personnel. Yet, time after time, opponents of Hatch Act reform cite this type of coercion as a reason employees should continue to be prevented from political participation.

In short, the Hatch Act is a sweeping ban on partisan electoral participation. Technically, it incorporates the 3,000 pre-1940 Civil Service Commission rules. This problem was explicitly recognized by the former U.S. Civil Service Commission. In 1949, the commission acknowledged that "the public cannot go to the original source to study the commission's pre-Hatch Act determinations, because they are embodied in diffused files and records of the commission, which are continually expanding through the years."

Further, the commission stated that even if the records were available, significant problems might inhibit gaining access to them because they "contain matter which was received under express or implied pledge of confidence." So, not only are these rules confusing, they are in some ways not available for review or further interpretation.

You would probably be surprised at the many phone calls and letters we receive at APWU headquarters during the course of most any election. Postal workers, seeking advice from their personnel offices, and local elected officials simply cannot find sources of reliable information as to what does, or does not, constitute violations of the Act.

Sadly, some workers don't even vote, they simply drop completely out of the political process, rather than chance violating the law. Both S. 135 and H.R. 20 simplify, clarify, and narrow Hatch Act restrictions, thus allowing Postal and Federal employees to more intelligently participate in the democratic process.

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[1] See p. 111 for Mr. Biller's prepared statement.

The Supreme Court has twice considered the constitutionality of the Hatch Act, and, while the Court has upheld the Act by narrow margins, both times the Court has suggested that Congress change the law.

Supreme Court Justice Black wrote in an early challenge to the constitutionality of the Act: "Legislation which muzzles several million citizens threatens popular government not only because it injures the individual muzzled, but because of its harmful effects on the body politic in depriving it of the political participation and interest of such a large segment of our citizens. Forcing public employees to contribute money and influence can well be prescribed in the interest of 'clean politics 'and public administration. But, I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints, and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organizational activity to urge others to vote and take an interest in political affairs; bars them from performing the interested citizen's duty of insuring that his or her fellow citizen's votes are counted. Such drastic limitations on the right of all the people to express political opinions would be inconsistent with the First Amendment's guarantee of freedom of speech, press, assembly, and petition. And it would violate, or come dangerously close to violating Article I and the Seventeenth Amendment of the Constitution, which protects the right of the people to vote for their Congressmen and their United States Senators and to have their votes counted . . ."

A guest editorial by Representative Connie Morella, Republican of Maryland, in the Washington Post, made the point most directly during debate in the 100th Congress. The U.S. Constitution begins with, "We the people . . ." and not "We the people, except Federal and Postal employees . . ."

S. 135 continues, and in some cases strengthens some penalties for violations of the law. Anyone violating the restrictions on engaging in prohibited political activities is subject to dismissal from employment, fines, and up to 3 years in jail. The sanctions, coupled with protections afforded under civil service laws, are strong deterrents.

In 1974, most of the restrictions on State and local employees holding federally-funded positions were lifted. In addition, between 1975 and 1983, 13 States reduced and liberalized State "little Hatch Act" prohibitions on public employee political activities.

A subsequent House Post Office and Civil Service Subcommittee found that, while public employee political activity increased in these States, there was no parallel increase in the improper use of authority or coercion.

Recent data from the Congressional Research Service reveals that public employees in some 40 States are already allowed leisure-time political freedom comparable to that permitted by the Hatch Act reform legislation. During discussion of H.R. 3400, a bill introduced in the House during the 100th Congress, Representative Morella of Maryland found that of the neighboring States, there had been no Hatch Act violations since the change in State law in the 1970's.

Mr. Chairman, opponents of Hatch Act reform have reminded us over and over of the need to maintain strict enforcement of the current Hatch Act. However, at some point, intelligent people must ask at what price. If there are few, if any, problems in States with liberalized "little Hatch Act" laws, and if there are substantially increased penalties for violations of the modified law, what could be the possible downside of reform?

In a nation with one of the lowest percentages of voting-age population going to the polls in a democracy, what could possibly be wrong with allowing millions of employees to be free from confusion, and able to participate in the political process to the extent of his or her next door neighbor?

Good government results from the largest possible participation in the process. As we see the percentage of eligible voters dwindle with almost each national election cycle, it is important that we encourage participation in this most basic right. Legislation such as S. 135 and H.R. 20 does much to encourage this type of participation.

Thank you, Mr. Chairman, for scheduling these hearings and inviting me to express the views of the American Postal Workers Union. I am pleased to be able to testify and will be glad to respond to any questions concerning Hatch Act reform, to see that it moves to the White House and, hopefully, the President's favorable consideration.

Chairman GLENN. Thank you, gentlemen. Thank you very much.

You have both cited State experiences with Hatch Act reform and what has happened there, what has not happened there with the mini Hatch Act laws, as they are called or termed in general. Is there any thing that you have seen at the State level that does not carry over to the Federal level? Are there differences that we should be noting in some way that might make a difference in a Federal law, as opposed to the beneficial experience we have had at the State level?

Mr. Sombrotto?

Mr. SOMBROTTO. I don't think so. There are none that I can think of offhand, that I can see that there should be a difference.

Chairman GLENN. Do you anticipate a major immediate surge of new political activity within your membership ranks if S. 135 passes, or is this something that is going to be more long-term evolution, than revolution?

Mr. SOMBROTTO. Well, I don't think that there is going to be an immediate rushing to the polls. I think what it does is, though, is relieve our members of the fear of participating in the political process, because of the restrictions that the Hatch Act impose upon them.

Our members, hopefully, vote. We hope they vote at the same consistency and the same tendencies as the rest of the American public. We would that more of them would vote. But we think it is a disservice to them to feel that they are less than any other citizen, they refer to themselves as second-class citizens when you speak of the Hatch Act. When 93 percent of the members say they want to see Hatch Act reform, it tells you very clearly that this is something that is needed and it is long due and coming.

Chairman GLENN. Mr. Biller, do you see major differences in the way the States have administered their mini Hatch Acts and how this would be administered after passage of S. 135 at the Federal level?

Mr. BILLER. No, I don't. As a matter of fact, I think S. 135 also is necessary protections and is appropriately formed. I am not sure what type of surge we will see in the activities of the membership, but I believe you will see emotional ecstacy, because they are going to feel liberated from such tremendous deterrence that they have had exercised over them through the years.

Chairman GLENN. How do you handle this within the labor movement itself, as far as your membership? Are there reporting mechanisms currently available through the unions to detect and prevent coercion? What are they and how extensively are those used?

Mr. SOMBROTTO. Certainly, in terms of our union, we encourage any member to alert us to any attempted coercion to them, by anyone, including other union members. I mean, it is just wrong for people to be coerced, and we don't subscribe to that. We think that this law, S. 135, does that pretty clearly. It continues the penalties imposed on those that would coerce employees, whether they are their subordinates or whether their fellow workers. I mean, it doesn't make any difference. No one should be coerced in society when they want to exercise their right of political freedom.

Mr. BILLER. Well, here is a law that was enacted to prevent coercion which was taking place, particularly from superiors over subordinates, and now it has just kind of been turned around into its opposite and become a deterrent to legitimate involvement by rank and file people in the political process.

Chairman GLENN. Yes.

Mr. BILLER. And even if you listen to the pious statements of Office of Special Counsel, the Circuit Court of Appeals thankfully exonerated Mr. Sombrotto and Mr. Blaylock and myself.

Chairman GLENN. Well, one thing, we have increased the range of penalties too, for violations under S. 135 so that should make it even——

Mr. BILLER. That is right.

Mr. SOMBROTTO. And well we should, and we support that very strongly.

Chairman GLENN. Senator Roth?

Senator ROTH. Thank you, gentlemen.

I wonder, do you prefer the House or the Senate version of the Hatch Reform?

Mr. BILLER. If you want an honest answer, I prefer the House version, but we would be glad to accept the Senate version, too.

Senator ROTH. But you do support the House version?

Mr. BILLER. Yes, I do.

Senator ROTH. Is that the same with you, Mr. Sombrotto?

Mr. SOMBROTTO. Yes, and if I take it that you are willing to come along with us and support the Senate bill, we would be glad to count you amongst us. [Laughter.]

Senator **Roth**. Now, both of you gentlemen, in your own private position, represent the Postal Union, isn't that correct?

Mr. **Sombrotto**. Yes, we represent two of the postal unions.

Senator **Roth**. You are with the Letter Carriers, Mr. Biller.

Mr. **Biller**. Yes.

Senator **Roth**. I wonder—the reason I raise that is the suggestion has been made that perhaps the Postal Service, as a quasi-independent agency, to be excepted from the Hatch Act, because there are distinctions between that operation and those that are part of the Federal Executive Branch, would you agree with that?

Mr. **Biller**. Well, I cannot speak for Federal employees, but in terms of Postal workers, yes, I do agree.

Senator **Roth**. That there is a significant difference?

Mr. **Biller**. Yes. I don't know why that would lessen any desire to reform the Hatch Act, but I believe that, yes.

Senator **Roth**. Let me ask you this: Is there a difference in your judgment between, say, a Postal worker or one that works for the FBI or the IRS or one of those sensitive agencies? Does it concern you that, particularly under the House bill, they could go out and solicit contributions from anyone? Should there be an exception made with respect to those individuals, those operations?

Mr. **Biller**. Not in terms of rank and file workers, no.

Senator **Roth**. But would you agree that the IRS, for example, is in a special category. For example, whether it is requests for funds for political activity coming from the IRS could be a threatening matter to other individuals?

Mr. **Biller**. Well, I believe that the proposed legislation covers these possibilities. I think it has adequate protections in all of these cases. That is why I support this reform.

Senator **Roth**. Are you talking about both the House and Senate bills?

Mr. **Biller**. Yes.

Mr. **Sombrotto**. If I may interject, I think that is one of the misconceptions, and you use IRS as an example. Those that are strongly opposed to Hatch Act reform are using this as some kind of a scare tactic, an IRS agent is going to come to audit your taxes, and as he comes in the door and sits down and says, "Will you make a contribution to this political candidate? If so, I will"—and the implication is that you will get a favorable audit or, if you don't, you are going to get a lump, and I think that is just a bunch of rubbish, because the law will protect those people, because all you have to do is report that person and the penalties are much more stringent and stricter under S. 135 and the House version.

In terms of the difference between Postal employees and other Government employees or Federal employees, there is a difference only in that the Postal Service was established as a quasi-independent corporation in 1971. But the fact is that the workers are still the workers and, whether they are Federal or Postal, they should all be given the opportunity to exercise the same freedoms under law. After all, I am only 43 years as a Federal employee, my colleague Mr. Biller, we hate to talk about how long he has been a Federal employee, over 50 years, and so we labor under Hatch Act——

Mr. **Biller**. Well, I came in before there was a Hatch Act.

Mr. SOMBROTTO. That's right, he did, in 1936, there was no Hatch Act. So, it is your fault there became a Hatch Act. [Laughter.]

But we labored under it and we understand how other Federal employees feel, because we have been in that situation and we would——I don't want to give the impression that we are trying to isolate ourselves from the rest of Federal employees, we are not. We support this legislation because it protects the interests of all Federal and Postal employees.

Senator ROTH. Last year I received a letter from the Chairman of the Federal Election Commission, asking that agency employees be exempted from the new law. Would either one of you think that is a good proposition? Would it bother you if the Federal employment agency, the employees were there were of one party or the other, predominantly?

Mr. BILLER. Well, I am not going to deal with the enforcement level. We don't even have the legislation yet. What I see here is very serious reform and continuing protections, and that is why I support this legislation.

Mr. SOMBROTTO. I get a little, you know, disturbed when I hear people in the Justice Department start to talk about how difficult it is to prosecute people that violate the law. That does not give me a great deal of confidence in our ability to protect ourselves under the law. You know, they talk about how it is very difficult to pursue cases or whatever, it gives me no comfort.

I think there is adequate body of law that indicates what the violations are, and when there are violations that occur, people should be prosecuted, it is as simple as that.

Senator ROTH. Well, I think one has to keep in mind there are different laws, as I understand it. You have the criminal limitations, for example, in the case of the IRS solicitation. So, when you talk about the protection, it is a criminal statute and, of course, that requires proof beyond a reasonable doubt, so that is much more difficult.

Thank you, gentlemen. Those are all the questions I have.

Mr. SOMBROTTO. If I may, Mr. Chairman, in response, you posed a question or at least you gave a hypothetical with an IRS employee. There are some reasons, and the NTEU has provided me materials, which I will make available to the Committee that tells you why that could not happen, what the protections are for the citizen against the IRS.

Chairman GLENN. I think just as a comment before we wind up here, the House passed bill permits solicitation for political contributions and it would permit running for public office. In the Senate version, we stick with current law on the solicitation of money from the general public and we allow people to run for a party office but not for public office, so there are differences between the two bills.

Mr. BILLER. Well, I support your legislation. I also support H.R. 20.

Chairman GLENN. I understand that. I just wanted to point out the differences. We hadn't had those differences pointed out yet.

Thank you very much. It has been a long hearing and——

Senator ROTH. Could I ask just one more question?

Chairman GLENN. Surely.

Senator ROTH. Thank you.

Would you favor un-Hatching all the State employees? There are still some that are covered by the Federal law and the State law.

Mr. BILLER. Well, I am not that conversant with it, other than, again, as I say, for rank and file employees, I feel they should be given the greatest latitude to participate in the political process. That is not the case now, we surely know that, it has been pointed out before. I think reform does not mean destroying the particular legislation.

Senator ROTH. Let me put the question a little bit differently. Where the State has a law on the books, would you be supportive of having that prevail as far as State employees are concerned, rather than the Federal law? If there are Federal funds involved, they become "Hatched" employees to a certain degree.

Mr. BILLER. I am really not an attorney. Right now, I am dealing with the Federal legislation and I hope we can get this reform. I assume in States you are going to have 50 different State laws and I don't think I am qualified to deal with that.

Mr. SOMBROTTO. We have 41, which I make available for the record, 41 State laws, and there are varieties.

Senator ROTH. We are talking about for State employees.

Mr. SOMBROTTO. State employees, State and municipal employees, yes. It is like Campbell's Soup, it is a variety.

Mr. BILLER. We know that most of them have a great deal more latitude than Federal employees, and I don't think we should differentiate.

Senator ROTH. Thank you, Mr. Chairman.

Chairman GLENN. Thank you gentlemen. We appreciate your being here today.

The hearing will stand in recess subject to the call of the Chair.

[Whereupon, at 12:15 p.m., the Committee was adjourned, to reconvene subject to call of the Chair.]

101st CONGRESS
1st Session

S. 135

To amend title 5, United States Code, to restore to Federal civilian employees their right to participate voluntarily, as private citizens, in the political processes of the Nation, to protect such employees from improper political solicitations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. GLENN (for himself, Mr. DECONCINI, Mr. PRYOR, and Mr. STEVENS) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To amend title 5, United States Code, to restore to Federal civilian employees their right to participate voluntarily, as private citizens, in the political processes of the Nation, to protect such employees from improper political solicitations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Hatch Act Reform Amendments of 1989".

SEC. 2. POLITICAL ACTIVITIES.

(a) Subchapter III of chapter 73 of title 5, United States Code, is amended to read as follows:

★(Star Print)

"SUBCHAPTER III—POLITICAL ACTIVITIES

"§ 7321. Political participation

"It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.

"§ 7322. Definitions

"For the purpose of this subchapter—

"(1) 'employee' means any individual, other than the President and the Vice President, employed or holding office in—

"(A) an Executive agency other than the General Accounting Office; or

"(B) a position within the competitive service which is not in an Executive agency;

but does not include a member of the uniformed services;

"(2) 'partisan political office' means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but shall exclude any office or position within a political party or affiliated organization; and

"(3) 'political contribution'—

"(A) means any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose;

"(B) includes any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose;

"(C) includes any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and

"(D) includes the provision of personal services for any political purpose.

"§ 7323. Political activity authorized; prohibitions

"An employee may take an active part in political management or in political campaigns, except an employee may not—

"(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election;

"(2) knowingly solicit, accept, or receive a political contribution from any person, unless such person is—

"(A) a member of the same Federal employee organization; and

"(B) the solicitation is for a contribution to the multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))) of such Federal employee organization; or

"(3) run for the nomination or as a candidate for election to a partisan political office.

"§ 7324. Political activities on duty; prohibition

"(a) An employee may not engage in political activity—

"(1) while the employee is on duty;

"(2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;

"(3) while wearing a uniform or official insignia identifying the office or position of the employee; or

"(4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

"(b)(1) An employee described in paragraph (2) of this subsection may engage in political activity otherwise prohibited by subsection (a) if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.

"(2) Paragraph (1) applies to an employee—

"(A) the duties and responsibilities of whose position continue outside normal duty hours and while away from the normal duty post; and

"(B) who is—

"(i) an employee paid from an appropriation for the Executive Office of the President; or

"(ii) an employee appointed by the President, by and with the advice and consent of the Senate, whose position is located within the United States, who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) Section 3302(2) of title 5, United States Code, is amended by striking out "7203, 7321, and 7322" and inserting in lieu thereof "and 7203".

(2) The table of sections for subchapter III of chapter 73 of title 5, United States Code, is amended to read as follows:

"SUBCHAPTER III—POLITICAL ACTIVITIES

"7321. Political participation.
"7322. Definitions.
"7323. Political activity authorized; prohibitions.
"7324. Political activities on duty; prohibition.".

SEC. 3. AMENDMENTS TO TITLE 18.

(a) Section 602 of title 18, United States Code, relating to solicitation of political contributions, is amended—

(1) by inserting "(a)" before "It";

(2) in paragraph (4) by striking out all that follows "Treasury of the United States" and inserting in lieu thereof a semicolon and "to knowingly solicit any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person. Any person who violates this section shall be fined under this title or imprisoned not more than 3 years, or both."; and

(3) by adding at the end thereof the following new subsection:

"(b) The prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Rate Commission, unless that activity is prohibited by section 7323 or 7324 of such title.".

(b) Section 603 of title 18, United States Code, relating to making political contributions, is amended by adding at the end thereof the following new subsection:

"(c) The prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Rate Commission, unless that activity is prohibited by section 7323 or 7324 of such title.".

SEC. 4. AMENDMENTS TO THE VOTING RIGHTS ACT OF 1965.

Section 6 of the Voting Rights Act of 1965 (42 U.S.C. 1973d) is amended by striking out "the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 118i), prohibiting partisan political activity" and by inserting in lieu thereof "the provisions of subchapter III of chapter 73 of title 5, United States Code, relating to political activities".

SEC. 5. AMENDMENTS RELATING TO APPLICATION OF CHAPTER 15 OF TITLE 5, UNITED STATES CODE.

(a) Section 1501(1) of title 5, United States Code, is amended by inserting ", the District of Columbia," after "State".

(b) Section 675(e) of the Community Services Block Grant Act (42 U.S.C. 9904(e)) is repealed.

SEC. 6. APPLICABILITY TO POSTAL EMPLOYEES.

The amendments made by this Act, and any regulations thereunder, shall apply with respect to employees of the United States Postal Service and the Postal Rate Commission, pursuant to sections 410(b) and 3604(e) of title 39, United States Code.

SEC. 7. EFFECTIVE DATE.

(a) The amendments made by this Act shall take effect 120 days after the date of the enactment of this Act, except that the authority to prescribe regulations granted under section 7327 of title 5, United States Code (as added by section 2 of this Act), shall take effect on the date of the enactment of this Act.

(b) Any repeal or amendment made by this Act of any provision of law shall not release or extinguish any penalty, forfeiture, or liability incurred under that provision, and that provision shall be treated as remaining in force for the purpose of sustaining any proper proceeding or action for the enforcement of that penalty, forfeiture, or liability.

(c) No provision of this Act shall affect any proceedings with respect to which the charges were filed on or before the effective date of the amendments made by this Act. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

STATEMENT

OF

EDWARD S. G. DENNIS, JR.
ACTING DEPUTY ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
U. S. SENATE

CONCERNING

S. 135, THE HATCH ACT REFORM AMENDMENTS OF 1989

ON

JULY 25, 1989

Mr. Chairman and Members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on S. 135, the "Hatch Act Reform Amendments of 1989."

The Department of Justice has submitted to this Committee under separate cover a formal bill report on S.135. This bill report contains a detailed analysis of this legislative proposal, and raises several concerns dealing with this particular bill that I will not address in these remarks. I commend this bill report to the Committee's attention.

OVERVIEW

For the past half century, the Hatch Act of 1939 has prohibited all federal employees (except certain senior Administration executives who are confirmed by the Senate) from engaging in active political management. S.135 would reverse this situation by transforming what is today a presumption of prohibition into a presumption of permissibility. In short, this proposed bill, like its House companion H.R.20, would allow rank-and-file federal personnel to engage in all forms of active partisan political activity, except a few narrow forms of clearly abusive practices.

If enacted into law, S.135 would amount to a virtual repeal of the Hatch Act. It would permit federal employees to engage in such presently prohibited, but overtly partisan activities as:

- holding office in a political party;

- working in partisan political campaigns or in party organizations;

- publicly endorsing partisan candidates and urging the general public to support them, at the request of the candidate, his campaign or a political party organization;

- soliciting political contributions from fellow federal employees in certain circumstances.

On its face, this bill might arguably seem innocuous to some people. Indeed, S. 135 has been touted as a "civil rights" and "free speech" bill for rank-and-file federal personnel.

Unfortunately, the experience we have gained over the years investigating and prosecuting public corruption indicates that the exact opposite is the case. While the intentions of this bill's drafters may be commendable, we believe that the consequences of its enactment will be extremely detrimental to both federal personnel and federal programs. More specifically, we are convinced that this bill poses a very real risk of subjugating the political freedom of those who have chosen to pursue careers in public service to the partisan agenda of the politically powerful, all to the detriment of the quality and impartiality of federal public administration.

The Hatch Act is rooted in the political reality that, given the opportunity, partisan operatives will inevitably seek to exploit a politically active civil service for their partisan political ends. For the past half century, the Hatch Act has effectively responded to this problem by defining a maximum scope of political activity in which public servants may safely engage without compromising the independence and impartiality which the American public had come to demand in the ministerial administration of governmental programs. In the process, the Hatch Act has also protected all federal employees from political exploitation and patronage abuse. From the perspective of federal law enforcement, the Hatch Act has served the public -- and the public employee -- extremely well for over 50 years, by keeping the evil of corrupt patronage abuse far from the federal government's doorstep.

It is simply naive to believe that high-level political appointees, and other politically motivated or transient occupants of federal office, will not vigorously seek to exploit the increased political license which S. 135 would give to public employees by transforming them into political assets for those in power. Both the Department and its career prosecutors are convinced, based on their experiences in this area, that enactment of this bill would inevitably lead to three tragic consequences: (1) a dramatic increase in the politicization of federal public administration, with a concomitant decrease in the public's confidence in the quality and fairness of Government;

(2) the involuntary transformation of ministerial and career federal servants into political cadres; and (3) the diversion of public revenues to partisan political ends.

These adverse societal costs will be aggravated by the virtual inability of federal law enforcement to prosecute these corrupt patronage schemes, and to bring meaningful criminal remedies to bear on offenders under existing federal criminal laws in this area.

For these reasons, the Department of Justice strongly opposes the enactment of S. 135, and any other legislative measure that would repeal or weaken the Hatch Act.

I will expand on these ideas in these remarks.

THE HATCH ACT HAS DEEP HISTORIC ROOTS AND SERVES VITAL PUBLIC INTERESTS

It seems to us inevitable that an active and visible partisan work force would seriously diminish -- if not destroy -- public confidence in the even-handed administration of governmental operations. Even worse, history shows that allowing the general functioning of the Government to be handled by an overtly political work force invariably leads to political abuses within the Government, to the detriment of both federal employees and the impartial administration of federal laws and programs.

The 1939 Hatch Act was not enacted in a vacuum. It was a statute perceived by the Congress as a necessary and long overdue remedy to a century of increasingly gross patronage abuses within the Federal Government, not only within the community of federal civil servants, but also in the administration of federal programs.

Patronage, and the idea that "to the victor belong the spoils," go back to the Jacksonian era in the early nineteenth century. The adverse societal consequences of this invidious "spoils system" became increasingly apparent as the role of the Federal Government in the lives of the people expanded. Not long after the Civil War, the cancer of abuse had so infected the body of public administration that a disgruntled postal worker assassinated President James Garfield because of his disappointment over not receiving what he thought was his just patronage reward. The national reaction to this assassination led to the enactment of the Pendleton Civil Service Act of 1883. This statute created a merit civil service, whose members were to be selected on the basis of their qualifications for the jobs they sought, and not because of their political loyalty to the incumbent administration. At its beginning, the merit civil service comprised only about ten percent of the employees in the executive branch. This percentage increased substantially over the ensuing years, as the public demand for nonpartisan federal service became more vocal and acute.

By 1907, the need for still further safeguards against politicization of the federal public service prompted President Theodore Roosevelt to promulgate Civil Service Rule No. 1. This Rule banned all federal employees in the competitive service from engaging actively in political campaigns. Penalties for violating this Rule included disciplinary suspension and, in extreme cases, termination from employment. The Rule was administered on a case-by-case basis by the Civil Service Commission, which over the next 30 years rendered over 2,000 opinions interpreting this federal anti-politicking Rule. By this time, the United States was well on its way to guaranteeing a public administration that was both politically impartial, and free from internal political coercion.

However, the New Deal, and the subsequent flood of federal programs and grants to the States, led to new and undesirable forms of political patronage practices. New Deal programs enacted to help the poor, the dispossessed, and other victims of the Great Depression were perverted by local political bosses into instruments by which the politically loyal could be rewarded -- and the politically unfaithful punished. Corruption of federal programs for partisan political ends became so blatant that the governor of North Dakota was able to defraud the United States by diverting federal work relief program benefits into the coffers of local politicians. See Langer v. United States, 76 F.2d 817 (1935). By 1939, the public was demanding that such practices stop. The response of Congress was to enact the Hatch Act.

The main thrust of the Hatch Act was to prohibit virtually all employees of the Executive Branch of the Federal Government from engaging in "the active management of political campaigns," a concept that was defined in the statute to include all activities which the Civil Service Commission had determined to be illegal under Civil Service Rule No. 1. See 5 U.S.C. § 7324. The Hatch Act regulations which the Civil Service Commission promulgated have been codified at 5 C.F.R. § 733.101 et seq. These regulations permit federal employees to express opinions on political subjects, and to contribute to candidates of their choice. However, they prohibit federal personnel from such overtly partisan activities as soliciting political contributions, actively participating in political organizations, running for partisan office, and misusing their authority over public programs to achieve partisan ends.

The Hatch Act and its implementing regulations have been challenged before the Supreme Court on two separate occasions, as arguably unconstitutional infringements on the First Amendment rights of federal employees to freedom of association and expression. Both of these challenges resulted in resounding affirmations of the Act's constitutionality, as a necessary safeguard to ensure both the appearance, and the actuality, of a politically detached federal civil service. See United Public

Workers v. Mitchell, 330 U.S. 75 (1947); Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973). The issue thus is no longer whether the Hatch Act's politicking ban is constitutional; rather the issue is whether this prohibition furthers or hinders the public interest in safeguarding the nonpartisan implementation of federal laws, programs, and policies. The Supreme Court has clearly spoken on this subject.

While the Hatch Act is not the only protection federal law provides the public against political corruption in the civil service, it may be the most important. During the course of the half century it has been the law of the land, the Hatch Act has evolved into the foundation of a vital ethic of political neutrality which today permeates - and guides - the federal service. In the process, it has been the Criminal Division's experience that the Hatch Act ban has served as an effective shield against the tide of patronage abuse, which, history shows, can readily degenerate into favoritism and arbitrariness in public administration, and even into corruption, fraud and other forms of aggravated criminal abuses of power.

The fact that it has not been necessary to divert significant federal prosecutive resources to the investigation and prosecution of criminal patronage abuses is a direct consequence of the existence and deterrent influence of the Hatch Act. As long as it has been illegal under the Hatch Act for federal civil servants to solicit political contributions, forced political-giving schemes within the federal service have not materialized. As long as it has been illegal under the Hatch Act for federal employees to actively participate in political organizations, the diversion of federal program benefits to partisan political ends has been limited. As long as it has been illegal for federal employees to actively campaign for political candidates, federal offices have not been converted into political fiefs. As long as it has been illegal under the Hatch Act for federal employees to be political candidates or active advocates of partisan causes, the day-to-day administration of federal programs has been impartial -- and, no less importantly, has been perceived by the public as being impartial.

Repeal of the Hatch Act also will increase the level of public cynicism and distrust of government authority, diminish public respect for government service, and devastate the morale of the federal work force. The Federal Government today regulates a large portion of our daily lives, and performs extremely sensitive functions, most of which were unheard of in the days when the spoils system first took root in America. Given this pervasive federal influence over our citizens' affairs, we doubt very strongly that the American public would tolerate a law which allowed a Section Chief in the Criminal Division, who decides whether or not to prosecute public officials, to serve simultaneously in his off hours as a Party Chairman of a political party. We also seriously question whether the American public would long tolerate a government in which agents of the Internal Revenue Service, or the Federal Bureau of Investigation, were permitted to solicit political contributions for political candidates and political causes. We similarly doubt that the American public would tolerate the day-to-day administration of federal programs by ostensible "civil servants" who are actively and visibly affiliated with partisan political candidates and causes.

Of course, Mr. Chairman, repeal of the Hatch Act through legislation like that before us today will not, at least in theory, leave the federal work force completely defenseless in a world of political power. Criminal laws - many of them ancient throwbacks to the 1883 Pendleton Act - will still be in the Criminal Code for theoretical use in appropriately aggravated circumstances. However, as I shall explain more fully later in these remarks, remedies and sanctions such as these have little practical utility as deterrents to abuse in the context of an increasingly politically active civil service. Rank-and-file government employees are easily intimidated by the political currents in a government office where political activity is the norm. It is simply unrealistic to expect that such persons will endanger their ability to make a living by exposing superiors who make political demands upon them. To the contrary, it has long been our experience that most ministerial government personnel find it far easier - and "wiser" - simply to do what is asked of them politically rather than rock the boat.

In view of these realities, S. 135 does not, as it drafters claim, "restore" political liberties to federal civil servants. On the contrary, this legislation presents a very real danger of imposing a reign of political repression on the ranks of the federal civil service. In this regard, it is, we feel, particularly noteworthy that there has been absolutely no spontaneous ground swell of support for this legislation from the civil service community. Quite to the contrary, aside from the leadership of federal employee unions whose political power will be substantially augmented by the repeal of the Hatch Act, the sentiment among the vast majority of federal employees is that the Hatch Act is at worst a modest sacrifice for the privilege of public service, and at best a bastion of protection against patronage abuse.

In summary, enactment of the bill before this Committee will:

° Jeopardize public confidence in Government.

The confidence of the public in the integrity and impartiality of the day-to-day operation of governmental action rests on the fundamental premise that the Government operates in a fair and nonpartisan fashion. If rank-and-file federal employees were to engage in political affairs of a clearly partisan nature, this would have an immediate and devastating impact on the public's perception of nonpartisan governmental service by the civil service.

° Ignore the teachings of history.

The idea that a "politically responsive" federal civil service is more capable of serving the public good than a nonpartisan work force has been rejected by both the Legislative and Executive Branches for almost a century. History reflects that the only way to insulate federal personnel against both overt and subtle forms of political pressure is to prohibit these employees from actively engaging in any type of partisan campaigning. This is precisely what the existing Hatch Act does, and is precisely why the Hatch Act is so important.

° Place unrealistic demands on prosecutorial resources.

Past experience with the administration of federal laws designed to protect federal personnel against improper political influences indicates that relaxation of the rules against political activity by federal employees is likely to lead to an increase in political abuses. We therefore believe that S. 135 would create a climate conducive to the interjection of corrupting political influences into both the federal work place and the administration of federal programs. The investigation and prosecution of the crimes resulting from these illegal political influences will likely create substantial drains on federal prosecutorial resources. Indeed, we seriously doubt that the Department of Justice possesses the resources, the expertise, or the ability to prosecute more than a tiny fraction of the increased criminal patronage activity which the enactment of S. 135 would inevitably cause.

- Jeopardize the impartial administration of federal programs.

Many States do not have similar bars against visible political activities by state employees. "Two Percent Clubs," still exist in many State and local government civil service corps that require public employees to contribute a set percentage of their salary annually to the political party through which they obtained their employment. This is but one example of the sort of pernicious situation which exists in governmental agencies which do not have the benefit of protections such as the Hatch Act. The experience with the corrupt administration of the New Deal programs shortly before the Hatch Act was enacted graphically demonstrates what can happen to public administration when federal personnel are allowed to become active proponents of partisan causes. In all likelihood, repeal of the Hatch Act would return to the field of federal public administration the corrupt practices which existed prior to 1939.

S.135 IS NOT NECESSARY:

S. 135 rests on the erroneous thesis that today's federal employee is politically repressed by the Hatch Act -- in other words, that the Hatch Act bars federal employees from engaging in meaningful political activity. This simply is not true. The Hatch Act allows federal employees to engage in a great variety of important political functions, to express themselves meaningfully on political issues, and to play a voluntary role in our democratic process. The Act bars only a very narrow range of political conduct: that is, conduct which is clearly, unambiguously, and visibly partisan, such as --

- holding an office in a political club or party,
- soliciting political contributions or organizing partisan fund-raising activities,
- making speeches on behalf of partisan candidates,
- circulating partisan nominating petitions, and
- distributing campaign material in a partisan election.

In essence, the Hatch Act restrictions boil down to the single and salutary concept that federal employees, who are responsible for overseeing and implementing the nation's laws and programs, may not simultaneously be active agents of partisan political camps. While that is a restriction of sorts, it is hardly an absolute prior restraint on political expression and/or association.

For example, the Hatch Act currently permits federal employees to:

- register to vote and vote,
- contribute money to campaigns,
- express their views in private and in public (though not in a concerted way to elicit support for a candidate or party),
- run as an independent candidate in certain partisan contests in designated areas with a high concentration of federal employees,
- attend political conventions and rallies as a spectator,
- assist in nonpartisan voter registration drives,
- campaign for or against political referendum questions,

- participate as a nonpartisan poll-watcher or election judge,
- attend political fund-raising functions,
- wear political buttons (off duty or, subject to certain agency restrictions, on duty), and
- participate in nonpartisan campaigns.

These are important and substantial activities. The existing Hatch Act is, therefore, hardly the politically repressive ogre that the backers of S.135 would have the American public believe it to be. Federal employees are - and always have been - allowed a wide latitude of political expression, which they have always exercised vigorously and in a manner that is consistent with the privilege of public service. The need for such a drastic re-ordering of the ethic of public service such as that embodied in S.135 simply does not exist.

S. 135 PROVIDES NO SAFEGUARDS, AND IT ELIMINATES EXISTING ONES:

Not only would S.135 seriously jeopardize the nonpartisan nature of the federal civil service, it would in our view seriously undermine what criminal and civil enforcement authority presently exists to safeguard federal employees, programs and program recipients from political pressures and other forms of patronage abuse. Enactment of this bill will so complicate criminal prosecutions under existing federal criminal laws as to render statutes such as 18 U.S.C. §§ 595, 600, 601, 602, 603, 606 and 607 virtually useless. At the same time, this bill will effectively repeal existing statutes that provide a basis for achieving administrative and employment-related sanctions against federal employees who seek to force their colleagues to participate in political activities against their will.

Both of these problems have their roots in the simple fact that the goal of this legislative proposal is just not attainable in the real world of politics. S. 135 seeks to allow voluntary political activity by the federal civil service, while at the same time to provide some protection for employees who either do not want to participate in politics, or who wish to do so for candidates or political causes that are not supported by their superiors. It is difficult, if not impossible as a practical matter, to provide such protection for some workers, while simultaneously permitting aggressive and overtly active partisan politicking by others. As Senator Carl Hatch said in support of passage of the statute that bears his name, "I defy anyone to draw that line". Accordingly, S. 135 is conceptually flawed.

This bill will also directly restrict the scope and utility of several criminal laws which specifically address gross forms of patronage abuse. For example, under 18 U.S.C. § 602 it is presently a federal felony for federal employees to solicit certain types of political contributions from one another, while under 18 U.S.C. § 603 it is a federal felony for a federal employee to hand over political contributions to any other federal employee who is his or her "employing authority". Taken together, these two statutes are designed to shield subordinate federal personnel from political shakedowns (Section 602), as well as shield the administration of federal business from attempts at unjustified self-advancement by federal personnel through political ingratiation with their superiors (Section 603).

Section 7323(2) of S. 135 would change all of this by specifically allowing all inter-employee political contributions as long as both parties to the deal are members of a federal employee organization, and the political funds are to be contributed in the first instance to a political action committee affiliated with that labor organization. In such circumstances, not only would federal employees be allowed to contribute to their bosses, their bosses would be specifically allowed to solicit them without facing prosecution under 18 U.S.C. §§ 602 or 603!

What is more, there seems to us to be absolutely no basis for placing an inter-employee solicitation license in the place where S. 135 has placed it. Long and bitter legislative experience with the labor movement has, indeed, shown quite graphically that rank-and-file union members are particularly susceptible to coercive political pressures, and as such they need more, not less, statutory protections against such abuses. See e.g. United States v C.I.O., 335 U.S. 106 (1948); United States v Auto Workers, 352 U.S. 567 (1957); Pipefitters v United States, 407 U.S. 385 (1972).

Finally, reversing the direction of the Hatch Act, from a general ban on partisan campaigning and fund raising to a general license to engage in such activities, is bound to severely complicate the task of obtaining convictions under many other existing federal fraud and corruption laws. Once federal employees are encouraged to become politically active, and once fine distinctions between "right" and "wrong" such as the ones just mentioned are enacted into law, there will be very few defendants in patronage abuse cases who will not be successful in finding some basis in what is left of the Hatch Act to justify the activity for which they are being prosecuted. Given the fact that the prosecutor in such cases must usually prove that the defendant acted in willful contravention of the law, and that the prosecutor must always prove that the defendant is guilty "beyond a reasonable doubt", such fine statutory distinctions between "right" and "wrong" have a very real potential to severely cripple existing law enforcement efforts in the patronage abuse area.

Furthermore, the havoc to federal law enforcement posed by S. 135 is not confined to criminal prosecutions by the Department of Justice. This legislative proposal also risks substantially undercutting the present authority of the Office of Special Counsel (OSC), the Office of Personnel Management (OPM), and the Merit Systems Protection Board (MSPB) to impose even non-criminal personnel sanctions for aggravated patronage shakedowns.

Presently, regulatory authority exists under 5 U.S.C. §§ 7321 and 7322 for the President, acting through OPM, to provide for personnel sanctions against federal employees who require their collegues to make political contributions or perform political services, as a condition of their employment. These existing statutes also provide a basis for remedial relief for employees who are victims of such patronage abuses. Admittedly, the authority that presently exists under these statutes is not widely invoked today. This is because the Hatch Act, and in particular the present terms of 5 U.S.C. § 7324, strictly forbids all forms of partisan political activity within the ranks of the civil service.

However, under S.135 all of this would change. The present outright prohibition in Section 7324 would be transformed into a general license to engage in political activity, and in the case of members of employee unions to solicit political contributions from other employees who are also union members. At the same time, the authority which the President presently possesses under Sections 7321 and 7322 to prescribe rules forbid and deter coercive political practices through administrative prosecutions by the OSC would be eliminated. S.135 even repeals the Hatch Act provision, 5 U.S.C. § 7325, that contains the administrative penalty for violations. Such a state of affairs can hardly be characterized as readily condusive to effective administrative enforcement of what would be left of the Hatch Act, nor can it be expected to serve as an effective deterrent to patronage abuses.

CRIMINAL PATRONAGE ABUSES ARE EXTREMELY DIFFICULT TO DETECT AND PROSECUTE

The principal role of the Department of Justice in matters involving political corruption of public personnel and programs focuses on the criminal prosecution of aggravated offenders under federal criminal patronage statutes such as those in Chapter 29 of Title 18 of the United States Code. The experience we have gained over the years in this area has demonstrated quite clearly that this particular type of crime is extremely difficult to detect, and this type of criminal case is particularly difficult to prove.

The development of factually sufficient cases involving corrupt politicization of federal programs, employment and/or personnel suffers from four major problems:

The first problem lies in the fact that individual victims of patronage schemes rarely come forward, either because the victims agree with the politics of the person pressuring them, or because the relative "cost" of submission on an individual level is low (i.e., stuffing political mailings or purchasing a $50 fund-raising ticket compared to the possible cost of complaining and displeasing their supervisors and possibly jeopardizing their jobs). It is painfully true, but our experience has shown, that most rank-and-file public employees usually find it far more prudent to go along with political intimidation than to rock the boat, imperil their careers, and offend their superiors by complaining about it to authorities.

A second problem lies in the fact that most patronage abuses in government offices are subtle. Rarely does this sort of thing rise to a level where a superior actually fires a subordinate specifically because of the subordinate's refusal to perform political work or to give political contributions. The pressures to go along politically with one's superiors more often flow from peer pressure, a desire to please one's superiors, and unspoken mores of political fidelity to an incumbent political administration that normally attend employment in a civil service corps that is overtly political active. Even in States where political "clearances" political clearances have been routinely necessary to secure public jobs, the "clearance" function has been successfully postured as just another "check" to assure that only "qualified" applicants were hired. Such subtle forms of pressure to conform to the incumbent political norm are extremely difficult to formulate, or to prove, as crimes under the statutes (e.g. Chapter 29, Title 18, United States Code) that presently address this sort of thing.

A third problem is the fact that criminal convictions require proof of guilt beyond a reasonable doubt, and patronage matters simply do not easily lend themselves to such a clear factual standard. Those employees who do come forward to complain about political pressure within a public office normally have some ulterior motive for doing so. They are, more often than not, individuals who have experienced difficulties with their bosses, and who have an axe to grind. While this does not, in itself, prevent them from being true victims of political abuses, their bias does seriously compromise their utility as witnesses in criminal cases. Moreover, in those relatively few situations where improper pressure is unambiguously expressed to, and imposed upon, an identified victim, it is rarely is done in public, or in front of third party witnesses. This usually leaves prosecutors with, at best, one-on-one criminal cases that have little realistic chance of successful prosecution.

A fourth problem is cost. The investigation and prosecution of matters involving inappropriate politicization of public employment invariably require large investments of investigative and prosecutorial manpower. They normally present novel issues of law, and require large numbers of field interviews to be successful. Given other demands on prosecutorial time and resources, the Justice Department will be hard pressed to serve as the main bulwark against politicization of public service through our role as criminal prosecutors.

POLITICALIZATION OF PUBLIC EMPLOYEES IS STILL A VERY REAL PROBLEM:

S.135 springs from an underlying assumption that the days of political pressure within civil services have long passed, that the Hatch Act has outlived its original purpose, and that it can be safely repealed with little adverse consequence to the principle of merit public service. This assumption is plainly wrong!

To illustrate this important point, I would like to close these remarks with a few real life examples of the continued threat posed to public servants by lax political activity laws. What follows is merely intended to highlight the problem. The matters that follow all took place in local government offices, in States and localities that do not presently enjoy the degree of insulation from partisan political activity which the Hatch

Act has provided to the federal work force. This is certainly not intended to be an exclusive listing of every investigation and enforcement action we have taken in this area in recent years. It should, however, serve to illustrate the nature of the clear and present danger of which the Hatch Act has - for the large part - successfully kept from the federal doorstep in modern times:

- In 1975, Congressman J. Edward Roush of Indiana testified before a House subcommittee in support of increased penalties under 18 U.S.C. §§ 600 and 601, at which time he provided the Congress with several examples of specific written demands from the party in power in his home State to rank-and-file government personnel (many of them firemen, road laborers, and the like) for the political donation of a percentage of their government salaries.

- In 1985, A Special Federal Grand Jury in the Northern District of Illinois (Chicago) issued a report on the dynamics of the fraudulent election practices for which Chicago has until recently been infamous. After several years of hearing testimony, and after returning over 65 indictments charging Chicago officials with fraudulent voting practices, this grand jury determined that the driving force behind voter fraud in Chicago was the quest for patronage -- e.g., the power of the winning political faction to control the jobs of rank-and-file municipal personnel and award benefits to its "friends." It is not surprising that this vicious patronage system produced corrupt government, and required aggressive political work by even the most mundane public employees in order to obtain -- or retain -- municipal jobs.

* Two County Commissioners in Clark County, Indiana were indicted and convicted in Indianapolis during 1986 for overtly threatening a large group of highway laborers with the loss of County jobs if they did not make political contributions to the party in power. Several laborers who refused to contribute either were summarily fired, or simply left their jobs on their own accord, knowing that termination was the inevitable consequence of refusing to go along with such demands. This investigation also uncovered several other situations where Clark County employees -- including at least one paramedic -- were punitively transferred to job sites that were far removed from their homes and children because of the employees' lack of support for the incumbent political faction.

* Nine years ago the Public Integrity Section of the Criminal Division successfully prosecuted two high-level officials of the Upper Great Lakes Regional

Commission for misusing federal program funds for partisan purposes. See United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980).

- Just two months ago, in May, 1989, a Federal Grand Jury in Newark indicted the incumbent Mayor, and one of the incumbent City Councilmen, of the township of Guttenberg, New Jersey, for terminating the jobs of two exemplary police officers, and a 76-year-old school crossing guard, because these public servants refused to perform partisan political services for the incumbent city administration.

- During recent months, the Criminal Division has transferred two major patronage matters to the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB) for administrative enforcement under the so-called "Little Hatch Act" (5 U.S.C. §§ 1501 *et seq.*). Extensive criminal investigations had failed to produce sufficient evidence to support criminal charges in these cases. Both of these matters involved the solicitation by political appointees of political contributions -- usually in the form of dinner tickets -- from their subordinates. In one of these cases the OSC succeeded in obtaining meaningful penalties (including debarment from future public employment) against the Director of Personnel of the

Akron Municipal Housing Authority and two of her subordinates. See Special Counsel v. Parnell, 37 M.S.P.R. 184 (1988). In the other case, the OSC is presently seeking similar penalties against several political and senior supervisory employees of the Niagara Frontier Transportation Authority for doing much the same thing. In both these instances, the OSC has been successful in obtaining administrative sanctions against plainly unlawful behavior, largely because the Little Hatch Act is on the books, and the evidentiary requirements of this administrative statute are far less demanding than those applicable to criminal proceedings under statutes such as 18 U.S.C. §§ 595, 600, and 601.

* As a result of the OSC's recent successes in the area of patronage abuse, the Criminal Division is presently engaged in seeking ways to include the OSC in the overall enforcement of the federal patronage laws on the state and local levels. Accordingly, the number of administrative cases such as the ones just discussed can be expected to increase in the near future -- if, of course, S. 135 does not pass and the Hatch Act remains an effective enforcement tool.

These recent cases support our conviction that any relaxation of the Hatch Act's politicking ban will substantially diminish the protections which federal employees currently enjoy against political pressure, while affording no realistic expectation that the void thus created can be filled by the federal criminal justice system. The Department of Justice remains convinced that nothing short of the current ban on active partisan political activities by federal civil service employees will adequately protect the public's interest in the fair and impartial administration of government programs and policies, and the employees themselves from more or less subtle pressure by their superiors. As noted above, violations of the criminal patronage laws are notoriously difficult to prosecute and prove because the coercion usually occurs outside the presence of third-party witnesses, and the fine line between conduct that amounts to pressure and conduct that does not is exceedingly difficult to draw.

Experience has shown that the only way to prevent abuse in this area is by declaring the entire field off-limits.

CONCLUSION:

The Federal Government today enjoys a civil service system whose impartiality and fairness are justifiably held in high regard. The present system affords federal employees substantial latitude to participate in critical aspects of our democratic political process along with other citizens. It prohibits only that small portion of actively partisan political conduct which history shows will lead inevitably to the twin abuses of political intimidation and political corruption.

We submit that the immediate victims of repeal of the Hatch Act will be the individuals within the federal civil service, who will lose a meaningful and effective level of statutory protection against political pressure and manipulation. The next level of victims would be the federal programs and policies implemented by this newly politicized federal work force, which would become vulnerable to subtle manipulation to further the partisan goals of the current program administrators. The final victims of repeal of the Hatch Act would be the public, who would have lost -- not just the appearance -- but the actuality of non-partisan administration of the public's business.

We strongly urge that this Committee consider the grave repercussions of this legislation and retain the Hatch Act's essential protections against political corruption of federal personnel and programs.

The Administration has additional concerns with this legislation, including constitutional concerns, that are more fully developed in our accompanying bill report.

I would be pleased to respond to any questions from Members of the Committee.

STATEMENT OF
MARY F. WIESEMAN, SPECIAL COUNSEL
OFFICE OF SPECIAL COUNSEL

BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ON
S. 135

JULY 25, 1989

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

FIRST LET ME THANK YOU FOR INVITING ME TO TESTIFY ON BEHALF OF THE OFFICE OF SPECIAL COUNSEL (OSC) ON S. 135, THE "HATCH ACT REFORM AMENDMENTS OF 1989."

IN FORMULATING MY VIEWS ON S. 135, I HAVE BEEN GUIDED BY MY BELIEF THAT THE PRIMARY MISSION OF THE OSC IS THE PROTECTION OF FEDERAL EMPLOYEES FROM PROHIBITED PERSONNEL PRACTICES, ALONG WITH THE PROTECTION OF THE MERIT SYSTEM. IN MY OPINION, ENACTMENT OF S. 135, ENCOURAGING ACTIVE INVOLVEMENT IN PARTISAN POLITICAL ACTIVITIES BY FEDERAL EMPLOYEES TO AN EXTENT NOT SEEN IN OVER 80 YEARS, WOULD UNDERMINE PROTECTIONS CURRENTLY AVAILABLE TO THEM AND ADVERSELY AFFECT THE INTEGRITY OF THE MERIT SYSTEM. PASSAGE OF THIS BILL, IN MY VIEW, WOULD LEAD INEVITABLY TO THE INTRUSION OF

PARTISAN POLITICS INTO THE FEDERAL WORK-PLACE IN DIRECT AND INDIRECT WAYS, INCLUDING BOTH OVERT AND SUBTLE FORMS OF COERCION. IT WOULD ALSO LEAD TO THE EROSION OF CONFIDENCE IN THE INTEGRITY OF GOVERNMENTAL DECISION-MAKING AND PROCESSES, AND IN THE EFFICIENT DELIVERY OF GOVERNMENTAL BENEFITS AND SERVICES.

AS THE COMMITTEE IS AWARE, THE OSC'S SERIOUS CONCERNS ABOUT S. 135 HAVE BEEN SHARED BY A WIDE AND UNUSUALLY DIVERSE SPECTRUM OF PUBLIC INTEREST, BUSINESS AND FEDERAL EMPLOYEE GROUPS. STRONG CONCERNS HAVE BEEN EXPRESSED TO MY OFFICE BY MANY FEDERAL EMPLOYEES DIRECTLY AFFECTED BY POTENTIAL LOOSENING OF HATCH ACT PROTECTIONS. WE HAVE SEEN NO EVIDENCE OF WIDESPREAD SUPPORT, MUCH LESS INSISTENCE, BY FEDERAL EMPLOYEES GENERALLY FOR REPEAL OF EXISTING HATCH ACT PROVISIONS. WHILE WE HAVE NOT CONDUCTED A SURVEY OF FEDERAL EMPLOYEE ATTITUDES IN THIS AREA, THE STRONG IMPRESSION OF OSC CAREER STAFF WHO, OVER THE YEARS, HAVE ADDRESSED NUMEROUS FEDERAL EMPLOYEE GROUPS AROUND THE COUNTRY IS THAT AN OVERWHELMING MAJORITY DO NOT WANT THE REMOVAL OF THESE PROTECTIONS.

THIS BILL WOULD, AMONG OTHER PROVISIONS, REPEAL 5 U.S.C 7321 AND 7322, WHICH AUTHORIZE THE PRESIDENT TO PRESCRIBE RULES TO PREVENT COERCION OF POLITICAL FUNDS AND SERVICES; REPEAL 5 U.S.C 7323, WHICH PROHIBITS EMPLOYEES FROM REQUESTING, RECEIVING OR GIVING A THING OF VALUE TO OR FROM ANOTHER EMPLOYEE, A MEMBER OF CONGRESS OR AN OFFICER OF A UNIFORMED SERVICE FOR POLITICAL

PURPOSES; AND REPEAL EXISTING RESTRICTIONS ON PARTISAN POLITICAL ACTIVITY BY ALL FEDERAL EMPLOYEES, SO LONG AS THE EMPLOYEES ARE NOT ON DUTY, IN UNIFORM, IN A ROOM OR BUILDING USED FOR OFFICIAL BUSINESS OR IN A GOVERNMENT VEHICLE. EMPLOYEES WOULD BE PERMITTED TO ENGAGE IN NOW-RESTRICTED PARTISAN POLITICAL ACTIVITIES, INCLUDING BUT NOT LIMITED TO RUNNING FOR PARTY OFFICE, MANAGING POLITICAL CAMPAIGNS, MAKING CAMPAIGN SPEECHES, AND ORGANIZING POLITICAL RALLIES AND FUND-RAISING EVENTS. THE BILL WOULD RETAIN EXISTING PROHIBITIONS ON THE ABUSE OF OFFICIAL AUTHORITY AND SOLICITATION OF CONTRIBUTIONS IN THE WORKPLACE, BUT EXCEPTIONS WOULD PERMIT EMPLOYEES TO SOLICIT FUNDS FROM CO-MEMBERS OF THE SAME EMPLOYEE ORGANIZATION (EVEN SUBORDINATES) IF THE SOLICITATION IS FOR A CONTRIBUTION TO THE MULTI-CANDIDATE POLITICAL COMMITTEE OF SUCH FEDERAL EMPLOYEE ORGANIZATION. IT APPEARS THAT S. 135 ALSO REPEALS 5 U.S.C. 7325, CONTAINING PENALTIES FOR VIOLATION OF THE HATCH ACT, AND SUBSTITUTES NOTHING IN ITS PLACE.

THE OSC HAS BEEN RESPONSIBLE FOR THE ENFORCEMENT OF THE HATCH ACT PROVISIONS RELATING TO POLITICAL ACTIVITIES OF FEDERAL EMPLOYEES, AND CERTAIN STATE AND LOCAL GOVERNMENT EMPLOYEES, SINCE ENACTMENT OF THE CIVIL SERVICE REFORM ACT (CSRA) IN 1978. THE OSC CONTINUES TO HAVE THIS RESPONSIBILITY UNDER THE WHISTLEBLOWER PROTECTION ACT OF 1989. A VITAL COMPONENT OF THAT FUNCTION IS THE OSC'S STATUTORY RESPONSIBILITY UNDER SECTION 1212(F) FOR ISSUANCE OF ADVISORY OPINIONS TO FEDERAL, STATE AND LOCAL GOVERNMENT EMPLOYEES CONCERNING HATCH ACT MATTERS.

The OSC issues such advisory opinions in response to oral or written inquiries from employees on Hatch Act issues. OSC attorneys are available during regular business hours to respond to such questions and to give advisory opinions. Agency personnel offices, Offices of Inspector General (OIGs), Offices of General Counsel (OGCs), agency managers and unions routinely refer employees to the OSC for authoritative advice and interpretations of the Hatch Act. Since September of 1983, we estimate that the OSC has responded to approximately 8,000 requests for both routine and non-routine information on federal, state and local Hatch Act matters. Last year alone, we answered approximately 1,400 oral and written questions about the Hatch Act from federal, state and local employees. Most individuals requesting an advisory opinion were also provided with OSC publications explaining the provisions of the Hatch Act.

Of course, these advisory activities did not begin in 1978 with the enactment of the CSRA, but continued the advisory role previously carried out by the Civil Service Commission (CSC). OSC advisory opinions, therefore, draw from and build upon the accumulated interpretations of the Hatch Act reflected in CSC determinations through 1978. The OSC informs employees of the Hatch Act restrictions on active participation in the management and conduct of partisan political campaigns, and as importantly, OF ACTIVITIES AND BASIC RIGHTS OF PERSONAL POLITICAL EXPRESSION SAFEGUARDED TO THEM BY THE ACT. THESE INCLUDE THE RIGHT TO:

-- REGISTER AND VOTE AS THEY CHOOSE

-- EXPRESS OPINIONS ABOUT CANDIDATES AND ISSUES

-- JOIN POLITICAL PARTIES OR CLUBS

-- SIGN NOMINATING PETITIONS

-- CONTRIBUTE MONEY TO POLITICAL ORGANIZATIONS OR ATTEND FUND-RAISING FUNCTIONS

-- ATTEND POLITICAL MEETINGS AND RALLIES

-- ASSIST IN NON-PARTISAN VOTER REGISTRATION DRIVES

-- PARTICIPATE IN NON-PARTISAN POLITICAL CAMPAIGNS

-- CAMPAIGN FOR OR AGAINST REFERENDUM QUESTIONS, CONSTITUTIONAL AMENDMENTS OR MUNICIPAL ORDINANCES

-- WEAR OR DISPLAY POLITICAL BADGES, BUTTONS OR STICKERS

AN IMPORTANT ADJUNCT OF THE OSC'S RESPONSIBILITY FOR ADVISING EMPLOYEES ON PERMISSIBLE AND IMPERMISSIBLE POLITICAL ACTIVITIES IS THE OSC'S OUTREACH EFFORTS. THESE CONSIST PRIMARILY OF DISSEMINATION OF OSC PAMPHLETS AND POSTERS ON HATCH ACT ISSUES AFFECTING FEDERAL, STATE AND LOCAL GOVERNMENT EMPLOYEES AND POLITICAL ACTION COMMITTEES, AND TRAINING AND OTHER PUBLIC SPEAKING ENGAGEMENTS BY KNOWLEDGEABLE OSC STAFF. THE OSC HAS DISTRIBUTED OVER 150,000 OF ITS HATCH ACT PAMPHLETS AND POSTERS IN THE PAST FIVE YEARS, PROVIDING BASIC HATCH ACT ADVICE IN CLEAR AND CONCISE TERMS. SINCE SEPTEMBER OF 1986, OSC EMPLOYEES HAVE SPOKEN TO MORE THAN 3,000 PEOPLE ON THE HATCH ACT, INCLUDING PRESIDENTIAL APPOINTEES, MEMBERS OF THE SENIOR EXECUTIVE SERVICE, AGENCY ETHICS OFFICERS AND LABOR AND EMPLOYEE RELATIONS SPECIALISTS.

IN THE PUBLIC DEBATE WHICH HAS ARISEN OUT OF THE CURRENT EFFORT TO REPEAL IMPORTANT HATCH ACT PROTECTIONS, SOME HAVE CLAIMED THAT EMPLOYEES NEED TO BE FREE TO ACTIVELY PARTICIPATE IN PARTISAN POLITICAL ACTIVITIES BECAUSE THE CURRENT HATCH ACT STATUTE IS VAGUE AND CONFUSING. IT HAS ALSO BEEN SAID THAT EMPLOYEES HAVE CENSORED THEIR OWN ACTIVITIES IN AN EXCESS OF CAUTION BECAUSE THEY DO NOT KNOW WHAT IS PROHIBITED AND WHAT IS NOT, ALLEGEDLY DUE TO A PERPLEXING ARRAY OF FEDERAL REGULATIONS SAID TO NUMBER IN THE THOUSANDS. REGULATIONS COVERING HATCH ACT ACTIVITIES, HOWEVER, APPEAR IN TITLE 5 OF THE CODE OF FEDERAL REGULATIONS AT PART 733, AND, IN TWO PAGES, CLEARLY OUTLINE THE 13 PERMITTED ACTIVITIES, AND 16 PROHIBITED ACTIVITIES. FURTHER, AS I HAVE SAID, THE OSC IS CHARGED BY LAW WITH THE RESPONSIBILITY FOR ISSUING ADVISORY OPINIONS TO ASSIST EMPLOYEES. EVEN WITH THE BEST REGULATIONS AND ACTIVE OUTREACH, THERE WILL ALWAYS BE SOME EMPLOYEES WHO ARE UNAWARE OF THE ESSENTIAL BASIC PROVISIONS OF THE ACT OR ITS IMPLEMENTING REGULATIONS. TO THE EXTENT THAT THERE ARE EMPLOYEES WHO HAVE QUESTIONS ABOUT THEIR RIGHTS UNDER THE HATCH ACT, IT HAS BEEN OUR EXPERIENCE THAT EMPLOYEES USUALLY HAVE SUCH QUESTIONS BECAUSE THEY HAVE NOT READ THE REGULATIONS, CONTACTED THE OFFICIALS IN THEIR AGENCY RESPONSIBLE FOR STANDARDS OF CONDUCT MATTERS, OR AVAILED THEMSELVES OF THE OSC'S ADVISORY OPINION SERVICE. FINALLY, THE FACT CANNOT BE IGNORED THAT EMPLOYEES

SOMETIMES KNOWINGLY PROTECT THEMSELVES FROM UNWANTED PARTICIPATION IN POLITICAL ACTIVITIES BY CITING OSTENSIBLE HATCH ACT RESTRICTIONS ON THOSE ACTIVITIES.

SECTION 1216(A) OF TITLE 5 OF THE UNITED STATES CODE PROVIDES THAT IN ADDITION TO ITS OTHER DUTIES, THE OSC IS RESPONSIBLE FOR INVESTIGATING ALLEGATIONS OF INVOLVEMENT IN PROHIBITED POLITICAL ACTIVITIES BY COVERED FEDERAL GOVERNMENT EMPLOYEES UNDER CHAPTER 73 OF TITLE 5, AND BY COVERED STATE AND LOCAL GOVERNMENT EMPLOYEES UNDER CHAPTER 15 OF THE SAME TITLE (IN GENERAL, PERSONS EMPLOYED BY A STATE OR LOCAL AGENCY WHOSE PRINCIPAL EMPLOYMENT IS IN CONNECTION WITH AN ACTIVITY FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE FEDERAL GOVERNMENT). AS A RULE, OSC INVESTIGATIONS ARE PREDICATED UPON ALLEGATIONS RECEIVED FROM AGENCY EMPLOYEES, SUPERVISORS, OIGS, OGCS, THE PRESS AND OTHER MEMBERS OF THE PUBLIC.

THE OSC IS AUTHORIZED UNDER 5 U.S.C. 1215 TO FILE A COMPLAINT SEEKING DISCIPLINARY ACTION AGAINST AN EMPLOYEE AFTER AN OSC INVESTIGATION DISCLOSES EVIDENCE OF PROHIBITED POLITICAL ACTIVITY. FOLLOWING A FINDING OF A HATCH ACT VIOLATION BY A COVERED FEDERAL EMPLOYEE, THE MERIT SYSTEMS PROTECTION BOARD (MSPB) IS AUTHORIZED TO IMPOSE A PENALTY OF SUSPENSION FOR NO LESS THAN 30 DAYS, OR REMOVAL FROM FEDERAL SERVICE. VIOLATIONS BY A COVERED STATE OR LOCAL GOVERNMENT EMPLOYEE ARE PUNISHABLE BY REMOVAL.

The Hatch Act, and the principles incorporated in the Act, have been the subject of spirited, sometimes contentious, debate from at least the 1800's through today. From the earliest days of the Republic, involvement by federal government employees in partisan political activities has been seen to be a danger to the integrity of governmental service, and as important, if not more so, to the public's perception of the impartiality of government employees. Much has been written about the concerns expressed by a succession of Presidents and heads of the CSC about the politicization of the federal work force.

It is reported that President George Washington imposed a merit test for selection of his appointees. In his 1976 article "Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond," Professor Robert G. Vaughn outlined the historical development of the Act. He noted that as early as 1801, President Thomas Jefferson prescribed a policy of political neutrality for federal employees in a circular stating that:

> [T]he President of the United States has seen with dissatisfaction officers of the government taking on various occasions active parts in the elections of public functionaries, whether of the general or state governments . . . The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but

> it is expected that he will not attempt to influence the votes of others, nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.

An early statutory prohibition on political activities of federal employees was enacted by Congress in 1876. That act prohibited an executive employee from requesting, receiving or giving "a thing of value for political purposes." In 1883, Congress enacted the Pendleton Act, the first comprehensive civil service reform legislation, which provided that no person in public service should for that reason be obliged to contribute to a political fund or to provide any service. It also established the CSC and authorized the President to issue rules to prevent political coercion. Civil Service Rule 1, promulgated by President Chester A. Arthur, reiterated the statutory prohibition on the use by civil service employees in the classified service of official authority or influence to coerce the political action of any person or body.

In 1907, President Theodore Roosevelt amended Civil Service Rule 1 in a further effort to arrest the politicization of the civil service. This order became the forerunner of the legislation enacted by Congress in 1939, known since that time as the Hatch Act. Whereas the 1883 version of Rule 1 was aimed at eradicating coercive political activity in the civil service, the

1907 version restricted both *coercive* and *voluntary* political activity in the following terms:

> No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provision of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, *shall take no active part in political management or in political campaigns*. (Emphasis added)

During election campaigns held in 1936 and 1938, scandals arose regarding political misuse of federal relief funds administered by the Works Progress Administration. As a result, the Hatch Act, "[A] bill to prevent pernicious political activities," was enacted in 1939 to provide a more effective means of ensuring the integrity and nonpartisan, politically neutral posture of the burgeoning civil service. Enactment of the Hatch Act, in effect, codified Civil Service Rule 1 and applied it to virtually all Executive Branch employees, mandated removal for violators, and expressly permitted employees to express their opinions on all political subjects.

The Hatch Act has been amended in some significant respects since 1939, but without affecting the essential protections applicable to federal employees. Amendments to the Hatch Act enacted in 1940 expanded the statute to extend political prohibitions to District of Columbia employees, as well as to certain state and local employees in agencies funded by federal loans and grants; expressly permitted employees to express their opinions on political candidates as well as political subjects; further defined "an active part in political management or in political campaigns" as those acts prohibited by the CSC before July 19, 1940; and authorized active employee involvement in non-partisan elections and issues. In 1950, the penalty provisions mandating removal of federal Hatch Act violators was amended to permit the imposition of a 90-day suspension without pay, and, in 1962, the minimum sanction to be imposed against violators was reduced to 30-day suspension without pay. In 1974, the restriction on state and local employees was eased to permit such employees to actively participate in political management and campaign activities, while continuing the prohibition on their partisan political candidacy for public office. The provision identifying exempt District of Columbia employees was also redefined. In 1979, references in the law to the defunct CSC were changed to refer to the MSPB.

In the leading cases of *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), the

Supreme Court held that the Hatch Act's restrictions on active involvement by federal employees in political management or political campaigns did not violate either their constitutional rights of free speech, assembly or due process, and were not vague or overbroad. With these two decisions, the Supreme Court made it clear that the Hatch Act reflects a permissible, and appropriate, balance between government employee participation in political affairs, and governmental interests in the efficiency and the real and apparent integrity of its operations. Recently, courts have ruled that the expression by federal employees of opinions on political candidates and issues is unrestrained by the Hatch Act, so long as the employee is not speaking on behalf of, or in connection with, a political party, or partisan groups or candidates. Blaylock v. U.S. Merit Systems Protection Board, 851 F.2d 1348 (11th Cir. 1988); Biller v. U.S. Merit Systems Protection Board, 863 F.2d 1079 (2d Cir. 1988).

There can be little question at this point that the restrictions on active involvement in partisan political activities by government employees which have evolved over a period of 200 years reflect judgments, shared by all three branches of government, that no public employee should be penalized for his or her political beliefs, or used as the political minion of the party in or out of power; that personal merit, rather than political allegiance, should be the basis for selection, promotion, ratings, awards, and other incidents of employment; that government

EMPLOYEES SHOULD MAKE AND IMPLEMENT PUBLIC POLICY AND PROGRAMS CONSISTENT WITH THE LAW AND NOT A POLITICAL PARTY AGENDA; THAT INTEGRITY AND IMPARTIALITY IN THE DISCHARGE OF OFFICIAL DUTIES SHOULD BE SAFEGUARDED; AND THAT THE PUBLIC SHOULD BE HELD SECURE IN THE KNOWLEDGE THAT GOVERNMENT EMPLOYEES ARE PUBLIC SERVANTS IN EVERY SENSE OF THE TERM.

TODAY'S HEARING IS YET ANOTHER IN A CONTINUING SERIES OF CONGRESSIONAL EFFORTS TO REASSESS THE BALANCE STRUCK BY A SUCCESSION OF PRESIDENTS AND THE CONGRESS, AND UPHELD BY THE SUPREME COURT, BETWEEN EMPLOYEE RIGHTS AND VITAL PUBLIC INTERESTS. AFTER EARNEST CONSIDERATION OF THE ARGUMENTS FOR AND AGAINST THE DRAMATIC CHANGES IN HATCH ACT PRINCIPLES THAT WOULD BE EFFECTED BY S. 135, I HAVE CONCLUDED THAT I CANNOT SUPPORT THE CHANGES PROPOSED, BECAUSE THEY WOULD SO FUNDAMENTALLY RECAST A LAW THAT HAS SERVED SO LONG AND SO WELL TO PROTECT THE VAST MAJORITY OF GOVERNMENT EMPLOYEES, AND TO PRESERVE IMPORTANT PUBLIC VALUES.

AMONG MY CONCERNS IS THAT EVEN WITH THE STRONGEST OF CONTROLS AGAINST COERCION OF POLITICAL ACTIVITY BY GOVERNMENT EMPLOYEES, IT SEEMS UNREALISTIC TO BELIEVE THAT THEY WILL BE OBLIVIOUS TO THE ADVANTAGES OF POLITICAL PARTISANSHIP WHEN COMPETING FOR PROMOTIONS, TRAINING, OR OTHER EMPLOYMENT BENEFITS WITH OTHER POLITICALLY ACTIVE EMPLOYEES. OVERT COERCION IS DIFFICULT ENOUGH BY ITSELF TO GUARD AGAINST AND DETECT. THE MORE SUBTLE FORMS OF COERCION ARE ALMOST IMPOSSIBLE TO REGULATE, ESPECIALLY WHEN THEY

ARISE IN THE CLIMATE IN WHICH THE UNSPOKEN ASSUMPTION IS THAT POLITICAL CONFORMITY IS THE ROUTE TO ACHIEVEMENT AND SECURITY. SUCH A CLIMATE LEADS INEXORABLY TO SUBTLE, SELF-IMPOSED PRESSURES ON EMPLOYEES TO CONFORM, OR APPEAR TO CONFORM, TO WHATEVER POLITICAL TENDENCY WILL ASSURE GREATER JOB SECURITY.

THIS PHENOMENON WAS BEST DESCRIBED BY ROBERT HAMPTON, FORMER HEAD OF THE CSC, IN HIS TESTIMONY IN 1975 ON AN EARLIER EFFORT TO LOOSEN HATCH ACT RESTRICTIONS ON POLITICAL ACTIVITY. HE SAID THEN:

> THERE MAY ALWAYS BE POLITICAL APPOINTEES OR ADMINISTRATORS WHO, FOR ONE REASON OR ANOTHER, BELIEVE THAT EITHER THEIR PERSONAL INTERESTS OR THEIR PHILOSOPHICAL INTERESTS WILL BE SERVED BY WORKING FOR PARTISAN POLITICAL CANDIDATES REPRESENTING THE PARTY IN POWER. WHILE SUCH PERSONS MAY NOT COERCE THEIR SUBORDINATES, THEY WILL MAKE IT WELL KNOWN WHERE THEY STAND ON THIS ISSUE. FOR A SUBORDINATE TO ACTIVELY SUPPORT THE OPPOSITION CANDIDATE UNDER SUCH CIRCUMSTANCES WOULD REQUIRE UNUSUAL COURAGE. IT IS EQUALLY TRUE THAT FOR A SUBORDINATE TO REFRAIN FROM SUPPORTING HIS SUPERIOR'S CHOICE OF CANDIDATE WILL ALSO REQUIRE COURAGE.
>
> . . . THERE IS A MORE SUBTLE FORM OF COERCION WHICH ONLY PROHIBITORY LEGISLATION LIKE THE HATCH ACT CAN DEAL WITH. THIS IS THE INTERNAL PRESSURE WHICH IS APPLIED BY THE CIVIL SERVANT TO HIMSELF IN THE HOPE OF ADVANCING HIS OR HER

CAREER. KNOWING THE PARTISAN POLITICAL VIEWS OF THE PEOPLE WHO MUST MAKE PROMOTION DECISIONS, AND FACING A VACANCY FOR WHICH THE EMPLOYEE IS IN COMPETITION AT THE TIME OF A POLITICAL ELECTION, AND BELIEVING THAT OTHERS IN COMPETITION MAY BE ENGAGING IN PARTISAN POLITICAL ACTIVITY FOR THE SAME PARTY AS THAT OF THE SELECTING OFFICER, THE EMPLOYEE WILL BE UNDER GREAT PRESSURE BOTH TO REFRAIN FROM SUPPORTING CANDIDATES OF THE OPPOSITION, AND TO ACTIVELY SUPPORT CANDIDATES FAVORED BY HIS SUPERIOR.

THESE CONCERNS RESONATE FOR ME WHEN I CONSIDER THE RECENT PROSECUTIONS BY MY OFFICE OF NUMEROUS STATE OFFICIALS IN TWO DIFFERENT STATES FOR POLITICAL COERCION OF SUBORDINATE STATE EMPLOYEES. SINCE CONGRESS LOOSENED THE PROHIBITIONS ON POLITICAL ACTIVITY BY STATE AND LOCAL EMPLOYEES, THEY ARE PERMITTED BY LAW TO ACTIVELY PARTICIPATE IN PARTISAN POLITICAL CAMPAIGNS AND ORGANIZATIONS. THE COERCION OF THESE EMPLOYEES IN ONE CASE ONLY CAME TO OUR ATTENTION WHEN A COURAGEOUS FORMER EMPLOYEE BLEW THE WHISTLE ON THIS CORRUPTION OF POWER. WHEN OSC INVESTIGATORS FIRST ARRIVED ON THE SCENE, THEY WERE MET WITH CONSIDERABLE RETICENCE. ONLY THROUGH THE PERSISTENCE OF OSC INVESTIGATORS AND ATTORNEYS, AND THE COMPULSION OF SUBPOENAS, WERE WE ABLE TO OVERCOME WITNESSES' FEAR OF COMING FORWARD AGAINST THEIR BOSSES. THE INVESTIGATIONS IN BOTH OF THESE CASES UNCOVERED NUMEROUS INCIDENTS OF POLITICAL COERCION OF SUBSTANTIAL SUMS OF MONEY AND SERVICES FROM MANY SUBORDINATE EMPLOYEES, WHO CAME TO BELIEVE THAT THEIR

SUBMISSION TO SUPERVISORS' DIRECT AND INDIRECT BLANDISHMENTS WAS THE BUILT-IN "PRICE" FOR SELECTION, JOB REWARDS AND JOB SECURITY. INDICATIONS OF POLITICAL COERCION BY STATE EMPLOYEES IN OTHER JURISDICTIONS HAVE ALSO SURFACED RECENTLY IN CONNECTION WITH INVESTIGATIONS BY THE OSC AND OTHER LAW ENFORCEMENT AGENCIES. THE INVESTIGATIVE AND PROSECUTIVE EXPERIENCE OF THE OSC AND OTHER AGENCIES AT THE STATE AND LOCAL LEVEL GIVES ME NO REASON TO BELIEVE THAT FEDERAL WORKERS WILL BE EFFECTIVELY INSULATED FROM POLITICAL COERCION AND REPRISAL ONCE THE RESTRICTIONS ON ACTIVE PARTISAN POLITICAL ACTIVITY ARE REMOVED -- NOTWITHSTANDING THE CONTRARY INTENTIONS OF SKILLED, WELL-MEANING LEGISLATIVE DRAFTSMEN.

AN ADDITIONAL CONCERN IS THAT IF JOBS AND BENEFITS GO TO EMPLOYEES ACTIVELY INVOLVED IN POLITICAL ACTIVITIES FOR A PARTY OR CANDIDATE ALSO SUPPORTED BY A SUPERVISOR, THEN IT SEEMS REASONABLE TO EXPECT THAT EMPLOYEES WHO ARE POLITICALLY INACTIVE OR WHO HAVE WORKED FOR ANOTHER PARTY OR CANDIDATE, WILL CONCLUDE THAT IT WAS THEIR POLITICS -- NOT THEIR PERFORMANCE -- THAT COST THEM THEIR PROMOTION, A FAVORABLE RATING, OR TRAINING OPPORTUNITY. WITH THAT, WE WOULD HAVE TO EXPECT A SIGNIFICANT INCREASE IN COMPLAINTS TO THE OSC OF DISCRIMINATION BASED ON POLITICAL AFFILIATION, AND ALLEGATIONS OF POLITICAL COERCION OR REPRISAL FOR FAILING TO ENGAGE IN POLITICAL ACTIVITY (PROHIBITED PERSONNEL PRACTICES UNDER 5 U.S.C. 2302(B)(1)(E) AND 2302(B)(3)).

I QUESTION WHETHER FEDERAL GOVERNMENT EMPLOYEES AND THE MERIT SYSTEM AS A WHOLE SHOULD, ABSENT COMPELLING CIRCUMSTANCES, BE SUBJECT TO THESE TYPES OF ADDITIONAL DIRECT OR INDIRECT PRESSURE POINTS ON THE LOYALTIES AND ENERGY OF THE GOVERNMENT WORKFORCE. MUCH HAS BEEN SAID ABOUT THE CHILLING EFFECT OF THE HATCH ACT ON EMPLOYEES' FREEDOMS, INCLUDING CLAIMS THAT EMPLOYEES CENSOR THEIR OWN CONDUCT TO SUCH A EXTENT THAT THEY REFRAIN FROM ENGAGING IN EVEN PERMISSIBLE POLITICAL ACTIVITIES. I RESPECTFULLY SUBMIT, IF HISTORY IS ANY GUIDE, THAT THE REVERSE WOULD LIKELY BE TRUE IF THE HATCH ACT WERE REVISED TO PERMIT PARTISAN POLITICAL ACTIVITY -- THAT IS, EMPLOYEES WOULD FEEL THE NEED TO ENGAGE IN PARTISAN POLITICAL ACTIVITY THAT THEY WOULD NOT HAVE UNDERTAKEN OTHERWISE, SO THAT WHAT WOULD BE PERMITTED UNDER A "REFORMED" HATCH ACT WOULD BE SEEN TO BE ADVISABLE, OR EVEN REQUIRED, TO WIN OR MAINTAIN THE FAVOR OF A POLITICALLY ACTIVE HIERARCHY IN THE WORKPLACE. I BELIEVE THAT THE EXISTENCE OF THE HATCH ACT RESTRICTIONS ON PARTISAN POLITICAL ACTIVITY HAS CREATED A CLIMATE IN WHICH THE OPPORTUNITIES FOR COERCION AND POLITICAL DISCRIMINATION ARE FAR FEWER THAN THEY WOULD BE WITHOUT SUCH RESTRICTIONS.

AN ADDITIONAL CONCERN IS THE EFFECT OF ANY REPOLITICIZATION OF THE WORKFORCE ON PUBLIC PERCEPTIONS OF GOVERNMENTAL INTEGRITY. OUGHT WE TO BE THINKING IN TERMS OF LEGISLATIVE ACTION THAT WOULD TEND TO INCREASE PUBLIC SKEPTICISM ABOUT THE INTEGRITY OF GOVERNMENT EMPLOYEES AND OPERATIONS, BASED ON PARTISAN POLITICAL INFLUENCES? IS IT REALISTIC TO THINK THAT WE CAN ACHIEVE A

POLITICALLY ACTIVE, YET IMPARTIAL AND OBJECTIVE GOVERNMENT WORKFORCE? WILL IT BE POSSIBLE FOR THE PUBLIC TO VIEW THE ACTIVITIES OF ANY GOVERNMENT WORKER ENGAGED IN PARTISAN POLITICS WITH FULL CONFIDENCE THAT THE EMPLOYEE'S UNDIVIDED LOYALTY IS TO THE PUBLIC AS A WHOLE WITHOUT REGARD TO THE AGENDA AND POLICIES OF A POLITICAL PARTY? HATCH ACT PRINCIPLES HAVE BEEN SO MUCH A PART OF THE FABRIC OF PUBLIC LIFE FOR SO LONG, THAT I THINK IT CAN FAIRLY BE SAID THAT THIS COUNTRY HAS EVOLVED A TRADITION OF A NON-PARTISAN, NEUTRAL PUBLIC SERVICE -- A TRADITION THAT WAS BORN OUT OF PAST ABUSES AND CORRUPTION OF THE MERIT SYSTEM.

AS I SAID AT THE OUTSET OF MY TESTIMONY, SINCE 1978, THE OSC HAS BEEN RESPONSIBLE FOR INTERPRETING THE HATCH ACT, ADVISING EMPLOYEES ON THE LAW AND ENFORCING THE LAW. THE OSC HAS FILED CHARGES OF HATCH ACT VIOLATIONS BY FEDERAL EMPLOYEES IN ONLY 30 CASES SINCE 1980. DURING THE SAME PERIOD, OF THE MORE THAN 11,000 ALLEGATIONS OF PROHIBITED PERSONNEL PRACTICES RECEIVED BY THE OSC FROM FEDERAL EMPLOYEES, ONLY 180 HAVE BEEN BASED ON CLAIMS OF DISCRIMINATION BASED ON POLITICAL AFFILIATION, NONE OF WHICH HAVE BEEN SUBSTANTIATED OR UPHELD. THESE STATISTICS DEMONSTRATE, IN MY OPINION, THAT THE HATCH ACT, AS IT APPLIES TO FEDERAL EMPLOYEES, IS AN INFREQUENTLY VIOLATED LAW, AND THAT ITS PROTECTIONS HAVE BECOME DEEPLY INGRAINED IN THE MERIT SYSTEM.

IN A RECENT SURVEY OF FEDERAL EMPLOYEES BY THE MSPB, ONLY ONE PER CENT OF THE ALMOST 17,000 RESPONDENTS EVEN ALLEGED THAT THEY

HAD BEEN DENIED A JOB OR JOB REWARD AS A RESULT OF THEIR POLITICAL AFFILIATION. THE MOST RECENT SURVEY OF FEDERAL EMPLOYEE ATTITUDES ON THE HATCH ACT WAS DONE IN 1967. IT FOUND THAT WHILE THERE WAS SOME CONFUSION AT THAT TIME OVER EXACTLY WHAT ACTIVITIES WERE PROHIBITED, 91 PER CENT OF ALL FEDERAL EMPLOYEES WERE AWARE OF LAWS OR REGULATIONS PROHIBITING PARTISAN POLITICAL ACTIVITY AND 85 PER CENT WERE AWARE OF THE HATCH ACT. THESE FIGURES STRONGLY SUGGEST THAT THE BASIC PRINCIPLES EMBODIED IN THE HATCH ACT HAVE BECOME SO INGRAINED IN PUBLIC EMPLOYEE CONSCIOUSNESS, SO MUCH A PART OF THE FABRIC OF PUBLIC SERVICE, THAT THE ACT IS VIRTUALLY SELF-POLICING -- THAT IS, WHILE EMPLOYEES MAY NOT BE FAMILIAR WITH ALL THE NUANCES OF ACT, THEY SEEM TO KNOW THAT POLITICAL ACTIVITY BEYOND VOTING AND EXPRESSIONS OF THEIR PERSONAL OPINIONS IS A REGULATED AREA, SUCH THAT PRUDENCE IS WARRANTED.

IN CLOSING, I BELIEVE THAT THE HATCH ACT REPRESENTS A JUDICIOUS BALANCE BETWEEN IMPORTANT FREEDOMS AND HISTORIC VALUES THAT HAS SERVED THIS COUNTRY, FEDERAL EMPLOYEES AND THE MERIT SYSTEM WELL, WHILE PERMITTING GOVERNMENT WORKERS LATITUDE IN EXPRESSING THEIR POLITICAL OPINIONS AND IN PURSUING PERMISSIBLE POLITICAL ACTIVITIES. I AM EXTREMELY CONCERNED THAT S. 135 WOULD UPSET THAT DELICATE BALANCE IN WAYS THAT WILL HAVE SERIOUS CONSEQUENCES FOR GOVERNMENT EMPLOYEES, THE MERIT SYSTEM, AND PUBLIC CONFIDENCE IN THE INTEGRITY OF THE GOVERNMENT AS A WHOLE. FOR ALL OF THESE REASONS, I DO NOT SUPPORT ENACTMENT OF THIS MEASURE.

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STATEMENT OF

MOE BILLER, PRESIDENT

AMERICAN POSTAL WORKERS UNION, AFL-CIO

before the

COMMITTEE ON GOVERNMENTAL AFFAIRS

U. S. SENATE

on

HATCH ACT REFORM
S.135

JULY 25, 1989

Congressional Testimony

Mr. Chairman, and Members of this committee, my name is Moe Biller. I am President of the American Postal Workers Union, AFL-CIO, the largest postal workers union in the world. We currently represent more than 365,000 members throughout the country. Our members are situated in every city, village, borough, and town in the United States.

The American Postal Workers Union has been a proponent for changes in the Hatch Act for many years. While we believe HR 20, passed in the House of Representatives on April 17, 1989 by a vote of 290-97 is preferable to S. 135, we believe S. 135 is an excellent vehicle to begin modifications in the archaic system of political disenfranchisement brought about by the law referred to as the Hatch Act. We believe that S. 135 is a workable alternative to the current regulations which have become more confusing and vague over the years.

Legal restraints limiting the political activity of government employees have been a subject of discussion in American government since the nation was founded. They were first considered by the Second Session of the First Congress in 1791. A debate on the levy of an excise tax on distilled spirits attempted to "prevent Inspectors or any other officer under them from interfering either directly or indirectly in elections ..... on penalty of forfeiting their offices."[1]

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[1] Dorothy G. Fowler, "Precursors of the Hatch Act," Mississippi Valley Historical Review, 47 (September 1969), 247.

Senator Carl A. Hatch of New Mexico joined with Senator Frederick Steiwer in 1937 to introduce a Senate bill designed to restrict political activity of government employees. A similar bill was introduced by John P. Kvale in the House, but like the Hatch and Steiwer bill, it received little attention.

During the 1938 Congressional elections there was evidence indicating that government funds and employees were used to aid in primary election campaigns. This activity and the use of government relief funds for partisan purposes caused reaction in Congress on the part of both the Democratic and Republican parties.[2]

It is important to note that the abuses which resulted in the Hatch Act being passed resulted not from voluntary participation by postal or federal employees in partisan politics, but from coercion and improper use of official authority by supervisory personnel. Yet, time after time, opponents of Hatch Act reform cite this type of coercion as the reason employees should continue to be prevented from political participation.

During the 94th Congress, both houses of Congress passed a bill, H.R. 8617, which would have repealed many of the prohibitions on political action. President Ford vetoed the measure, and the veto was sustained when the House fell 26 votes short of the two-thirds necessary to override it.

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[2] Pamela Ford, Political Activities and the Public Service: A Continuing Problem (Berkley: Institute of Governmental Studies, University of California, 1963), p.21. As Pamela Ford indicates: Passage of the Hatch Act in 1939 is attributed to one of the most heated issues of the 1938 national election campaigns--the actual or alleged misuse of relief funds for political purposes. Its enactment was the culmination of a long-standing controversy on the subject of the "spoils" and merit system in governmental employment in general and the propriety of political action by public employees in particular.

The Supreme Court has twice considered the constitutionality of the Hatch Act, and, while the Court has upheld the Act by narrow margins, both times the Court has suggested that Congress change the law.

Supreme Court Justice Black wrote in an early challenge to the constitutionality of the Hatch Act:

> Legislation which muzzles several million citizens threatens popular government not only because it injures the individual muzzled but because of its harmful effects on the body politic in depriving it of the political participation and interest of such a large segment of our citizens. Forcing public employees to contribute money and influence can well be prescribed in the interest of "clean politics" and public administration. But, I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints, and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organizational activity to urge others to vote and take an interest in political affairs; bars them from performing the interested citizen's duty of insuring that his or her fellow citizen's votes are counted. Such drastic limitations on the right of all the people to express political opinions would be inconsistent with the First Amendment's guarantee of freedom of speech, press, assembly, and petition. And it would violate, or come dangerously close to violating, Article I and the Seventeenth Amendment of the Constitution, which protect the right of the people to vote for their Congressmen and their United States Senator and to have their votes counted....[1]

Justice Douglas dissenting in part wrote a separate opinion. In his dissent Douglas said:

> ... To sacrifice the political rights of the industrial (governmental) worker goes far beyond any demonstrated or demonstrable need. Those rights are too basic and fundamental in our democratic political society to be sacrificed or qualified for anything short of a clear and present danger to the civil service system.

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[1] United Public Workers v. Mitchell, 330 U.S. 75 (1947) p.111.

In short, the Hatch Act is a sweeping ban on partisan electoral participation. Technically, it incorporates the 3,000 pre-1940 Civil Service Commission rules. This problem was explicitly recognized by the former U.S. Civil Service Commission. In 1949, the CSC acknowledged that "the public cannot go to the original sources to study the commission's pre-Hatch Act determinations, because they are embodied in diffused files and records of the commission, which are continually expanding through the years." Further, the Commission stated that even if the records were available, significant problems might inhibit gaining access to them because they "contain matter which was received under express or implied pledge of confidence." So, not only are these rules confusing, they are in some ways, not available for review or further interpretation. The result, much too often is that these regulations, often unequal enforcement practices, and differing interpretations have had a chilling effect on many of this nation's postal and federal employees. In fact, during hearings on HR 3400 during the 100th Congress, staff attorneys from the Office of Special Counsel, the enforcement office for Hatch Act violations, were unable to answer questions before the House Committee on Post Office and Civil Service's questions regarding specific violations of the law.

You would probably be surprised at the many phone calls and letters we receive at APWU Headquarters during the course of most any election. Postal workers, seeking advice from their personnel offices, local elected officials, simply cannot find sources of reliable information as to what does, or does not, consitute violations of the Act. Sadly, some workers don't even vote; they simply drop completely out of the political process rather than chance violating the law. Both S. 135 and HR 20 simplify, clarify, and narrow Hatch Act restrictions, thus allowing postal and federal employees to engage fully in the democratic process. A guest editorial by Representative Constance Morella (R-MD) in the Washington Post made the point most direct during debate in the 100th Congress. The U.S. Constitution begins, "We the People........NOT We the People EXCEPT federal and postal employees."

S. 135 allows employees to participate in a full range of political activities "after-hours" and away from the job site. Such activities include working phone banks, handing out political literature, voter registration, putting up yard signs, and participating in political caucuses. Employees would also be able to solicit, accept, or receive a political contribution from other members of their union for that union's multicandidate political action committee, once they are off-duty and away from the worksite.

S. 135 also continues, and in some cases strengthens, penalties for violations of the law. Anyone violating the restrictions on engaging in prohibited political activities is subject to dismissal from employment, fines, and up to three years in jail. The sanctions, coupled with protections afforded under civil service laws, are strong deterrents.

In 1974 most of the restrictions on state and local employees holding federally funded positions were lifted. In addition, between 1975 and 1983, 13 states reduced and liberalized state "little Hatch Act" prohibitions on public employee political activities. A subsequent House Post Office and Civil Service Subcommittee found that while public employee political activity increased in these states, there was no parallel increase in the improper use of authority or coercion. The records of the federal Merit Systems Protection Board confirm this fact, showing only 12 complaints lodged against state and local employees between 1980 and 1987. Recent data from the Congressional Research Service reveals that public employees in some 40 states are already allowed leisure-time political freedom comparable to that permitted by the Hatch Act reform legislation. During discussion of HR 3400, a bill introduced in the House during the 100th Congress, Representative Morella of Maryland found that of the neighboring states, there had been NO Hatch Act violations since the change in state law in the 1970's.

Mr. Chairman, opponents of Hatch Act reform have reminded us over and over of the need to maintain strict enforcement of the current Hatch Act. However, at some point, intelligent people must ask "At What Price"? If there are few, if any, problems in states with liberalized "little Hatch Act" laws, and if there are substantially increased penalties for violations of the modified law, what could be the possible downside of reform? In a nation with one of the lowest percentages of voting-age population going to the polls in a democracy, what could possibly be wrong with allowing millions of employees to be free from confusion, and able to participate in the political process to the extent of his or her next door neighbor? Good government results from the largest possible participation in the process. As we see the percentage of eligible voters dwindle with almost each national election cycle, it is important that we encourage participation in this most basic right. Legislation such as S. 135 and HR 20 does much to encourage this type of participation.

Perhaps a statement in favor of lifting these restrictions was best set out by the California Supreme Court in declaring a "little Hatch Act" of California unconstitutional.

> As the number of persons employed by government and governmental-assisted institutions continues to grow the necessity of preserving for them the maximum practicable right to participate in the political life of the republic grows with it. Restrictions on public employees, which, in some or all of their applications, advance no compelling public interest commensurate with the waiver of constitutional rights which they require, imperil the continued operation of our institutions of representative government.

Thank you Mr. Chairman for scheduling these hearings and inviting me to express the views of the American Postal Workers Union. I am pleased to be able to testify in favor of legislation to modify the Hatch Act, and I hope that the Senate will swiftly follow the lead of the House in passing Hatch Act, and moving it to the White House for, hopefully, the President's favorable consideration.

I would be pleased to answer any questions you or the other Members of this Committee might have.

TESTIMONY OF

ANTONIO J. CALIFA
LEGISLATIVE COUNSEL
WASHINGTON OFFICE

ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

ON

PROPOSED REFORMS OF THE HATCH ACT
S.135

BEFORE

COMMITTEE ON GOVERNMENTAL AFFAIRS

JULY 20, 1989

ACLU SUPPORTS REFORM OF THE HATCH ACT

The ACLU strongly supports prompt passage of S.135, the "Federal Employees' Political Activities Act of 1989." This legislation would restore to federal civilian employees their right to voluntarily participate in the political processes of the Nation while also providing important safeguards to protect such employees from improper political solicitation and coercion. The ACLU, a nonpartisan, nationwide organization of more than 250,000 members dedicated to the advancement of individual rights, strongly supports S.135 and commends Senators Glenn, DeConcini, Pryor, and Stevens for introducing this bill.

Background

The Hatch Act (5 U.S.C. Secs. 7321-7327) was passed on August 2, 1939, in response to reports of abuse by federal employees during the 1936 and 1938 elections. It has been amended many times since that date, but its basic premise remains the same: the alleged promotion of efficiency and integrity in the government by denying federal employees the right to fully participate in the political process. Originally, passage of the act was seen as the only way to prevent coercion of federal employees and to put an end to the spoils system. Today, fifty years after the passage of the Hatch Act, however, this is no longer the case. There have been many substantial changes in the makeup of the federal labor force and in the system of reporting and dealing with abuse. The Act that was originally intended to free the worker of the 1930s from threats and intimidation has become nothing more than a political muzzle around the voices of the workers of the 1980s. "As currently enforced, the Hatch Act no longer protects workers; it silences them and infringes on their First Amendment rights of free speech and association. And it is so confusing that it has a chilling effect on even the limited participation in the political process now allowed by law."[1] The time has come to reform the Hatch Act and to free federal workers from their political bondage.

The Hatch Act -- Legislative History

A study of the legislative history of the Hatch Act shows that it was enacted with little debate in 1939. There were no public hearings. Even this limited legislative history gives us some notion of the intent of Congress when passing the Hatch Act. The overriding concern of Congress was with Section 7324(a)(1) of the Hatch Act -- the use of a federal employee's official authority or influence to affect the outcome of an election. The official title of the Hatch Act was "An Act to Prevent Pernicious Political Activities."

The Hatch Act was enacted in response to reports of "threats and intimidation" of Workers Progress Administration (W.P.A.) workers during the 1938 election.[2] Senator Morris Sheppard of Texas, headed a special Committee on Campaign

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1. Sombrotto, "'Locked Out of the Political Ball Game,'" Wash. Post, September 21, 1988 (final ed.), p. A18.

2. Biller v. United States Merit Systems Protection Board, 863 F.2d 1079, 1085 (2d Cir. 1988).

Expenditures and Use of Funds and found cases of political *coercion* mainly involving W.P.A. supervisors and employees.[3]

Although Congress wanted to put an end to the use of coercion and intimidation in the federal workplace, the legislative history indicates that they were also deeply concerned by the Act's effect on the First Amendment rights of federal employees. President Franklin D. Roosevelt "cautioned that 'no legislation should be enacted which will in any way deprive workers on the [W.P.A.] Program of *the civil rights to which they are entitled in common with other citizens*.'"[4] During the House debates on the Hatch Act, Congressman Nichols stated that "you cannot remove this right guaranteed by the Constitution simply because a person holds a Federal position."[5]

These concerns are even more valid today than they were fifty years ago. There are many civil service employee protections existing today that did not exist in 1939. For example, we now have the Merit Systems Protection Board (by which nearly 80% of the federal workers are covered and protected as opposed to less than 32% in 1939), strong federal sector labor unions, and a probing press.[6] In addition, federal workers now face severe civil and criminal penalties for the use of coercion, threats and intimidation in the workplace.[7]

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[3] "It is a matter of common knowledge in almost every community of the Nation that taxpayers' money appropriated for W.P.A. was used to coerce and intimidate needy men, women and children. Many of those in charge of this relief boldly insisted that voters change their party registration and vote for candidates favored by those in charge of the W.P.A. and if they refused, they were denied W.P.A. work or were discharged ... Tens of thousands of people receiving large salaries were rendering no service to the people. They were devoting their time in pernicious political activities ... as pointed out by the press, the National Grange, the Republican Party, and other groups, the Hatch bill solves this problem." Eccles, James R., *The Hatch Act and the American Bureaucracy*, Vantage Press, New York, p. 70 (1981).

[4] *Biller* at 1085 citing 84 Cong. Rec. H9604 at 10746 (daily ed. July 20, 1939) (emphasis added).

[5] *Id*. at H9622 (statement of Rep. Nichols).

The legislative history is also replete with references to "taking the veil."[8] This was a shorthand reference to the right-privilege distinction. At the time the Hatch Act was enacted, public employment was viewed by our courts as a privilege that government could bestow on its own terms. In return for the privilege of government employment, the government could demand that an individual give up certain rights. The problem with this theory is that while "taking a federal job may entail the sacrifice of some political rights, it has never been the public sector equivalent of entering the priesthood."[9] The opponents of Hatch Act reform claim that "unhatching" federal employees will result in coercion and a return to the spoils system. As experience has shown, however, this simply is not true. A survey of the State Attorneys General "found no adverse effects resulting from [1974] changes in restriction"[10] and none of the 41 states now allowing their public employees greater participation in the political process have reported any problems. (1981).

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[6] "News Advisory," PR Newswire, April 22, 1988.

[7] For example, in Pieczynski v. Duffy, No. 88-2381 (7th Cir. May 30, 1989) (LEXIS, Genfed library), the court of appeals upheld the lower court's decision awarding the plaintiff $95,000 in compensatory damages and $7,500 in punitive damages in response to charges of political harassment on the job. The court held that the discharge of a public employee because of his political beliefs violates the First Amendment (Elrod v. Burns, 427 U.S. 347 (1976)) as does a campaign of petty harassments directed against a public employee in retaliation for his political beliefs or affiliations. Bart v. Telford, 677 F.2d 622 (7th Cir. 1982). See Anderson v. Creighton, 107 S.Ct. 3034, 3039 (1987), Kurowski v. Krajewski, 848 F.2d 767, 773 (7th Cir. 1988).

[8] United Public Workers v. Mitchell, 330 U.S. 75 (1947).

Hatch Act -- Provisions

Section 9(a) of the Hatch Act, 5 U.S.C. Sec. 7324(a)2, reads, in part, as follows:

> "An employee ... may not--
> (1) use his official authority or influence for the purpose of interfering with the result of an election; or
>
> (2) take an active part in political management or in political campaigns."

The ACLU joins other organizations testifying before this distinguished committee in opposing coercion and supporting free speech. An employee should not be allowed to use his official position as authority or influence to affect or attempt to affect the influence of an election. This coercion is inimical to First Amendment rights and must not be allowed. Employers cannot use their positions of trust to intimidate workers or the public to conform to their political judgment. This is the very antithesis of free and robust expression of First Amendment rights. We wholeneartedly support S.135 in its attempt to protect the worker from political coercion by other workers or by a supervisor.

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[9] Magness, "'Un-Hatching' Federal Employee Political Endorsements," 134 U. Pa. L. Rev. 1497, 1526 (1986).

[10] H.R. Rep. No. 100-376, 100th Cong., 1st Session; Federal Employees Political Activities Act of 1987 (House Report on Hatch Act Reform) at 11-12 (1987).

The ACLU urges reform of §9(a)(2) of the Hatch Act which prohibits an employee of the Federal government from taking an active part in political management or in political campaigns.

> For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited of employees in the competitive service before July 19, 1940 by determinations of the Civil Service Commission under the rules prescribed by the President.

"Thus in order to understand the substance of §9(a), one must become familiar with the Civil Service Commission's policy of interpreting and enforcing political activity rules under the executive orders and Commissions rules issued between 1883 and 1940."[11] This is troublesome for a number of reasons: pre-1940 decisions are not readily available; the Civil Service Commission was not granted rulemaking power to adjust or further interpret the statute, so this leaves the definitions frozen as they were in 1940; and large numbers of the more than 3,000 decisions provide only vague statements of standards by which violations were found.[12]

For example, federal employees can make financial contributions but cannot stuff envelopes. They can go to rallies and caucuses, but cannot speak or wave a sign. They can sign a petition, but cannot pass it to their spouse. As a result of these indeterminate standards, the average employees are unable to determine what is or is not permitted activity; hence they often over police themselves just to be on the safe side. In one case a woman did not know whether or not she could put her husband's picture on her campaign ad, so to avoid violating Hatch she left him off. As a result, the status of her marriage was questioned throughout her campaign and it may have cost her the election.[13]

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[11] Magness, supra, at 1503-04.

[12] Id. at 1504.

As written, and as applied, section 9(a)(2) of the Hatch Act is a bad law, a "gag" law. As Supreme Court Justice Hugo Black stated in his dissenting opinion in Mitchell: The Hatch Act "relegates millions of federal, state and municipal employees to the role of mere spectators of events upon which hinge the safety and welfare of all people including public employees."[14]

Federal employees are not the only ones hurt by the Hatch Act as currently applied. The public in general is also hurt when federal employees are kept out of the public debate. The public has a substantial interest in the workings of government and no one is in a better position to comment on the workings of government than federal employees. So by eliminating federal employees from discussion of public and governmental issues, the Hatch Act effectively deprives the general public of a qualified source of information.[15]

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[13] Feinstein and Nelson, "Hatch Act Reform," 35 Federal Bar News & Journal 274, 276 (1988).

[14] Mitchell, 330 U.S. at 115.

S.135 takes care of the aforementioned problems by allowing federal employees to participate freely in the political system when not on duty while also providing adequate safegaurds to protect against coercion and intimidation. The ACLU strongly supports S.135 and the returning of First Amendment rights to the federal workforce.

The Hatch Act and the First Amendment

The American guarantee of freedom of speech is found in the First Amendment to the United States Constitution, which reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment is a fundamental right of a free people. It stands at the pinnacle of rights cherished by all Americans, including federal employees. The First Amendment not only guarantees freedom of expression but especially guarantees freedom of political expression and action. Indeed, active participation in the political process was a fundamental goal of the Founders -- and one of the chief reasons for the Revolutionary War. Prominent men and women risked everything, even their lives, because the British government excluded them from the political process.

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[15] Solomon, "The Public Employee's Right of Free Speech: A Proposal for a Fresh Start," 55 U. Cin. L. Rev. 449, 470-1 (1986-87). See also Pieczynski v. Duffy, No. 88-2381 (7th Cir. May 30,1989) (LEXIS, Genfed library) and United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

The general standard for protection of speech is that it must be permitted unless a public danger is created by its exercise. This criteria does not permit the political sterilization of several million federal and postal workers in jobs ranging from janitorial to professional specialization simply for fear that coercion might be applied by superiors over subordinates to insist that they participate in partisan activity as the price of job advancement. The possibility that an employee could be coerced is not a public danger of a magnitude that justifies deprivation of speech, for as seen above, other safeguards now exist to protect against this. Nor is the possibility of coercion eliminated by removing from all employees their rights of free expression, since advancement within the government is always a matter of discretion on the part of the employee's supervisor.

The First Amendment is a fundamental right, occupying a place in our constitutional hierarchy reserved for those freedoms we hold most important. As a fundamental right, it may not be abridged except when there is a compelling state interest. The abridgment must be precisely and carefully drawn to preserve the state interest. As much as possible of the First Amendment must be left unfettered.

Let us analyze the Hatch Act according to the traditional "strict scrutiny" standard used in numerous cases.

Any statute regulating political speech must meet three criteria: (1) a compelling state interest must be at stake; (2) there must be a demonstrated need for regulation; and (3) the restriction must be narrowly drawn so as not to impose limitations greater than those necessary to protect the interest at stake.[16]

Does the Hatch Act "Regulate" Speech

Assuredly, the Hatch Act deals with speech. Participation in the political process is at the very essence of what the First Amendment means by speech and what the First Amendment protects.[17] The Hatch Act infringes very substantially on the First Amendment. The Hatch Act not only regulates speech, it prohibits speech by federal employees and workers. In this aspect, the Hatch Act is unique. If a federal employee or federal worker exercises rights that his or her fellow citizens routinely exercise, the federal employee will lose his or her job.[18] Here are some examples of the political activities that are so "pernicious" Americans must be deprived of their

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16. NAACP v. Button, 371 U.S. 415 (1963); Grayned v. City of Rockford, 408 U.S. 104 (1972).

17. Connick v. Myers, 461 U.S. 138 (1981).

18. 20 U.S.C. 7327.

livelihood if they engage in them. These examples are from the Office of Personnel Management.[19]

> Recent pronouncements from the United States Office of Personnel Management, successor to the United States Civil Service Commission, interpret Section 9(a) to prohibit: (1) being a candidate for nomination or election to a national or state office; (2) becoming a partisan candidate for nomination or election to any public office; (3) campaigning for or against a political party or candidate in a partisan election for public office or political party office; (4) serving as an officer of a political party, a member of a national, state or local committee of a political party, an officer or member of a partisan political club, or being a candidate for any of these positions; (5) participating in the organization or reorganization of a political party, organization, or club; (6) soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose; (7) selling tickets for or otherwise actively promoting such activities as a political dinner; (8) taking an active part in managing the political campaign of a candidate in a partisan election for public office or political party office; (9) working at the polls on behalf of a candidate or political party by acting as a checker, challenger, or watcher; (10) distributing campaign literature; (11) serving as a delegate, alternate, or proxy to a political party convention; (12) addressing a convention, rally, caucus, or similar gathering of a political party in support of or in opposition to a candidate for public office or political party office, or on a partisan political question; (13) endorsing or opposing a candidate in a partisan election through a political advertisement, broadcast, campaign literature, or similar material; (14) driving voters to the polls on behalf of a political party or candidate in a partisan election; or (15) initiating or circulating a partisan nominating petition.

In practice the trampling of first amendment rights goes even further. The House Civil Service Subcommittee has heard testimony from union members who have been told that the following were prohibited by the Hatch Act:[20]

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[19] Stephen A. Smith, "The Uncivil Servants: Public Employees and Political Expression" (A Paper Presented at the Southern Speech Communication Association Convention), Orlando, Florida, April 7, 1983.

> *A Social Security disability investigator could not comment in a union newspaper on which candidate he preferred after the union had heard all candidates speak.
>
> *A worker was told he could not seek a post in a non-partisan election. He was also told he could not put a campaign sign in his front yard.
>
> *Testimony was given concerning a prohibition of local union voter registration drives, once the International Union had endorsed a candidate.

Compelling State Interest

The compelling state interest advanced by the government is in a Civil Service governed by the merit system. In such a Civil Service, promotion is based purely on merit. An employee could not be coerced into partisan political activity in order to advance within the civil service. We will assume arguendo that the state has an important interest in preferring advancement within its Civil Service to be based on merit and not patronage or coercion.

There Must Be a Demonstrated Need for Regulation

There was some showing of need for regulation. In 1939, almost 50 years ago, Sen. Sheppard of Texas showed that a few W.P.A. workers were coerced into voting a certain way. This abuse would still be dealt with in the legislation which this committee is considering. Under S.135 it would be illegal to coerce workers into voting a certain way. A supervisor could not use his official position or influence to threaten or force workers to do his political bidding. Thus, the provisions of 5 U.S.C. Sec. 7324(a)(1) would remain in effect.

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[20] Testimony before Post Office and Civil Service Committee, Civil Service Subcommittee (June 3, 1987).

What about Sec. 7324(a)2 -- the part of the Hatch Act which has indeed been pernicious which prohibits an employee from taking an active part in political management or political campaigns? There is little, if any, record of abuse in this area. Indeed, Congress "unhatched" hundreds of thousands of state and local employees from this provision in 1974. The state and local employee is free to actively participate in political management and campaigning. Their freedom of speech and association has been restored for the most part. As mentioned above no serious problems, creating a danger to the state, were caused by this "loosening" of the Hatch Act.

In United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 93 S.Ct. 2880 (1973), in a decision which the ACLU considers to be incorrect, the Supreme court upheld the Hatch Act limitations on the First Amendment rights of covered employees. The Supreme Court has not taken a strong position on whether these draconian measures are necessary to preserve the merit system. Justice White writing for the majority stated:

"Perhaps Congress at some time will come to a different view of the politics of political life and governmental service."

We declare that the time has come for the Congress to come to a "different view."

There is no historical justification for restrictions on voluntary off-the-job First Amendment activities by federal or postal workers. There has never been a critical, factual evaluation based on empirical evidence as distinct from supposition. Since a fundamental right is involved, the burden of proof falls on proponents of such restrictions. They have not met the burden of proof.

The Present Hatch Act Restrictions Are Not Narrowly Drawn

Abuses can occur within the civil service. Where you have a large civil service under the merit system but also under political leadership, determined by an election's outcome, abuses can arise.

The restrictions on fundamental rights must be narrowly drawn. Present Hatch Act prohibitions are overbroad. The Hatch Act prohibits all partisan political activities, and many non-partisan activities, including those voluntarily undertaken and unrewarded, which in no way reflect the influence of a patronage scheme. The Hatch Act deals with the potential problems mentioned above by prohibiting almost all political activities. Further, it does so in vague language, incomprehensible to ordinary citizens. It incorporates by reference thousands of administrative decisions dating back to the last century. As a result many harmless activities are prohibited or thought to be prohibited. There is a very definite chilling effect created by the Hatch Act. By its breadth and vagueness, the Hatch Act terrorizes federal and postal employees into a state of total political inactivity.

It is much better to deal with the real problems of government employees and political activities. Here are a few examples of the specific problems that can be resolved without the Hatch Act solution of "throwing the baby out with the bath water."

*A bar on partisan activity while on duty in Federal buildings.

*A bar on partisan activity while in uniform.

*A bar on soliciting, giving or receiving political contributions in government rooms or buildings.

*A bar on coercion.

Conclusion

The Hatch Act as currently applied has outlasted its usefulness and is in immediate need of reform. Due to the changes in the structure of the federal workforce and in the system of reporting and detecting abuse, the Hatch Act no longer serves any valid purpose. The ACLU strongly supports efforts to protect the integrity and efficiency of the federal workplace by eliminating the use of coercion and intimidation, but S.135 allows us to reach this end without needlessly trampling on the First Amendment rights of federal employees and without denying the general public a knowledgeable source of information.

Federal employees already make many sacrifices in their course of service to the United States. Stifling political freedoms of nearly three million citizens when it no longer serves a necessary function to our country is not a sacrifice, but a needless slaughter of civil rights.[21]

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[21] Tobias, "The Hatch Act: 'A Tangled Jungle," Wash. Post, September 16, 1988, p. A26.

AFGE
AMERICAN FEDERATION of
GOVERNMENT EMPLOYEES

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES
JUSTICE FRATERNITY PROGRESS
AFFILIATED WITH AFL-CIO

to do for all that which none can do for oneself

STATEMENT

BY

JOHN N. STURDIVANT
NATIONAL PRESIDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
(AFL-CIO)

BEFORE THE

SUBCOMMITTEE ON
FEDERAL SERVICES, POST OFFICE, AND CIVIL SERVICE
GOVERNMENTAL AFFAIRS COMMITTEE

U. S. SENATE

ON

S. 135
HATCH ACT REFORM

JULY 25, 1989

Mr. Chairman, members of the Committee, my name is John N. Sturdivant. I am President of the American Federation of Government Employees, AFL-CIO (AFGE), which represents over 700,000 active and retired government workers across the country.

With this statement, we wish to indicate our continued support for reform of the Hatch Act and to urge, in the strongest possible terms, passage of a bill to achieve this long sought goal.

During the intervening half-century since enactment of the Hatch Act, a great deal has occurred which now mandates its reformation. More importantly, however, is what has occurred since the 100th Congress heard the views of both proponents and opponents on this important issue. When this Committee last held hearings on Hatch Act reform, concerns were expressed in broad sweeping generalities. Critics argued that reform would politicize the workforce and lead to coercion. No specifics were given. The same arguments are still being made and still, no examples are given. Opponents simply cannot express their concerns succinctly nor can they provide explicit examples. If they could, then advocates of reform would work toward adequately addressing them in terms of statutory language.

The Congressional sponsors of Hatch Act reform are convincing evidence of a truly bi-partisan effort. Organizational supporters are as diverse as their memberships: federal employee unions, postal unions, professional organizations, management associations; etc. Public employee supporters are as diverse as this nation's citizenry and include both staff and management employees, professionals, clericals, and blue collar workers, and republicans, democrats and independents. But, what is common to most public employees who advocate Hatch Act reform is that they almost universally espouse measures which work toward preserving a politically neutral civil service as well as towards eliminating patronage. And, they clearly understand that Hatch Act reform will not detract from this goal.

The Hatch Act, passed in 1939, was intended to insure that the civil service would be politically neutral and the spoils system would be eliminated. Since the passage of the Hatch Act, however, two very significant things have occurred. First, the very issues which became motivating factors for passage of the Hatch Act in the first place, are now embodied in other statutes. These will remain in effect if Hatch Act reform is achieved. These include a multitude of statutory provisions, many criminal, which insure the neutrality of the civil service and mandate that personnel practices be based on merit rather than on a patronage basis. (Attached is a list of some of those statutes and statutory provisions.) Hence, today's need for Hatch Act type restrictions should be stated in terms of those specific issues which are not covered in other statutes. The Hatch Act reform measures now pending achieve this.

Second, the over 3,000 Hatch Act decisions, many of which are not formally published, are indicative of the Act's ambiguity and therefore, of how employees are chilled in the exercise of the political rights they now have. This is patently unfair to federal employees. They deserve to have the cloud of uncertainty and ambiguity, inherent in the current statutory provisions and administrative rulings, removed. The Hatch Act reform measures now pending will accomplish this.

For these reasons, no valid arguments can be made against Hatch Act reform. Further, for these same reasons, 41 of the 50 states have now enacted measures permitting broader political freedoms for their state and local public employees than what is permitted federal and postal employees. Contrary to arguments against Hatch Act reform, the 41 states which permit public employees to meaningfully participate in partisan politics provide testimonials to the fact that such reform has not in any way impinged upon the integrity of the states' politically neutral civil services.

S. 135, as well as H.R. 20, the House version of Hatch Act reform, amends or reforms the Hatch Act. It does not repeal it. Both measures not only strengthen many of the existing provisions of the law but clarify them so that all employees know precisely what activity is permissible. In some instances, the proposals are more stringent than current law.

The language of the current Hatch Act provides that employees "may not use [their] official authority or influence for the purpose of interfering with or affecting the result of an election; or take an active part in political management or in political campaigns". (5 U.S.C. §7324). It also provides that an employee "retains the right to vote as he chooses and to express his opinion on political subjects and candidates". This has led to confusion because, in some instances, it has been unclear how one can express his opinion on a candidate without being said to have been taking "an active part in a political campaign".

S. 135 specifically continues the prohibition against employees using their official authority or influence for the purpose of interfering with or affecting the result of an election. It also would reduce the confusion over permissible activities by succinctly providing that:

> Federal and postal employees will not engage in political activity while on duty, in any building where the business of the government is being conducted, while wearing a uniform or official insignia identifying them as a public employee, or while using a government vehicle.
>
> Employees will not be permitted to run for partisan political office at any level.

Employees will not be allowed to solicit, accept or receive political contributions from the general public, a superior, or in a government building.

The current penalties of dismissal from employment or at a minimum, suspension of no less than 30 days, for Hatch Act violations will remain in effect under the reform measures. In addition, employees will continue to remain subject to the fines and jail sentences of up to three years for certain violations of federal criminal statutes including the prohibition against soliciting contributions.

When the Hatch Act was passed 50 years ago, its provisions were applicable to employees in the competitive service. At that time, this meant the restrictions were applied to approximately 10% of the workforce. Current Hatch Act provisions cover all employees in Executive agencies and the postal service as well as employees of the D. C Government. However, it does not cover employees paid from the appropriation for the office of the President, the head or assistant head of an Executive or military department or employees appointed by the President by and with the advice and consent of the Senate. It is easy to see how these exemptions could create an opportunity for political pressure to be brought to bear on subordinates. The reform measures would be applicable to all employees in the postal service or in an Executive Agency other than GAO. The only exceptions are the President and the Vice President and members of the uniformed services. Thus, it severely curtails the number of executive branch employees who are exempt from Hatch Act prohibitions and who could bring political pressure to bear on their subordinates.

The whole context in which the Government now operates has changed since 1939 because of enactment of various statutes. As mentioned above, these statutes protect employees from many of the very "evils" that were motivating factors behind enactment of the original Hatch Act. Because these statutes would remain in effect if the reform measures are enacted, in reality, reform is really a clarifying measure. It is sought partly because it would make clear exactly what political activities employees may or may not engage in.

The right of American citizens to participate freely in this nation's political process falls within the realm of the First Amendment rights guaranteed by the Constitution of the United States. However, such rights are not absolute. They may be limited or restricted when there is a compelling or overriding reason to do so. The government's need to insure that its business is efficiently and neutrally conducted is the broad basis upon which the Supreme Court has determined that the limited restriction of public employees' rights to be politically active is constitutional. However, constitutionality rests upon a clear showing by the government of a need for restriction. Once the need is expressed, then such restriction must be clearly defined and narrowed in order that it only proscribes that activity which would impinge upon the basis for the Government's articulated, compelling need.

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The need to restrict the political activities of employees is met by a balancing test--the needs of the government versus the rights of employees. Those who presently oppose reform have failed to balance the scale with their arguments. Why? Because they simply cannot clearly define their concerns nor specify the restrictions needed to overcome them. This was a problem when this Committee last held hearings and it continues to be a problem today. For example, opponents say that reform will lead to politicization of the workforce but they fail to clearly articulate how this will occur. Opponents suggest that reform will lead to return of the spoils system but fail to provide any specifics on why they believe this would be the result. Opponents of reform argue that the measure will pave the way for coercion, which they specify as being "subtle coercion", but give no examples of how this could occur.

The ultimate goal sought by AFGE and the many others who support reform, is to permit public employees to participate in partisan political activities as fully and freely as is possible while still maintaining the integrity of a competitive civil service, based on merit principles, where the government's business can be efficiently and effectively carried on free from political influence. The bi-partisan proponents of Hatch Act reform have seriously attempted to address each and every specific concern raised about Hatch Act reform. For instance, we believe that the differences between the Senate and House reform measures is an attempt to address such specific issues. However, unless additional specifics can be supplied, no other issues can be addressed. If specifics cannot be supplied, then we firmly believe that the arguments against reform are empty.

Federal employees have been disadvantaged, unduly restricted, chilled in the exercise of their first amendment rights, subjected to an unclear statute, subject to ambiguous rulings, treated as second class citizens for far too long. If there are narrow specific reasons for imposing definitive restrictions not presently covered by the reform measure or by other statutes, let's hear them. Then, we can focus on addressing them in a meaningful way. If not, let's put the stamp of approval on Hatch Act reform.

In closing, Hatch Act reform is sought for the purpose of striking a balance between the constitutional rights of employees and the need of the Government to maintain an unbiased civil service, free from political coercion and which is based on merit principles rather than on a spoils system. Reform is not sought for any other reasons whatsoever. There are no ulterior motives. The measure would not cost any money. It is simply fair, equitable and good public policy -- a measure which we believe should become an entitlement for public employees.

We do appreciate this opportunity to express our views on Hatch Act reform and we respectfully urge the Senate to act swiftly and adopt S. 135.

STATUTES AND STATUTORY PROVISIONS WHICH ARE INTENDED TO INSURE A POLITICALLY NEUTRAL CIVIL SERVICE

The following statutes, enacted after passage of the Hatch Act in 1939, serve a useful purpose in preserving the neutrality of the work force and negating practices relating to the spoils system:

Civil Service Reform Act of 1978, P. Law. 95-454, 92 Stat.111.

Chapter 23-Merit System Principles

5 U.S.C. §2301(b)(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

5 U.S.C. §2301(b)(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation,...

5 U.S.C. §2302(b)(1) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority discriminate for or against any employee or applicant for employment--

> (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation...

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

Federal Criminal Code provisions--18 U.S.C. §594, 595, 597, 598-607.

> 18 U.S.C. Sec. 594 prohibits the attempt or use of intimidation, threat, or coercion for the purpose of interfering with another's right to vote. A person in violation of this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> 18 U.S.C. §595 prohibits any person employed by the federal government in an administrative capacity from using his official authority for the purpose of interfering with, or affecting, the nomination or election of certain candidates for national office. Violators are subject to a fine of not more than $1,000 or one year in prison, or both.
>
> 18 U.S.C. §597 prohibits the making, offering, solicitation, acceptance or receipt of expenditures in consideration for one's vote or the withholding thereof. Violation of this section carries a fine of not more than $1,000 or maximum imprisonment of one year, or both. If the violation is willful, a fine of not more than $10,000 and imprisonment of not more than two years, or both, shall be assessed.
>
> 18 U.S.C. §598 prohibits the use of congressional appropriations for work relief, or the exercise of authority conferred by an appropriations act, for the purpose of interfering with an individual's right to vote. Violation of this section warrants a fine of not more than $1,000 or imprisonment for not more than one year, or both.
>
> 18 U.S.C. Sec. 599 prohibits a candidate from the direct or indirect promise or pledge, or the use of his influence, of the appointment of any person for the purpose of procuring support for his candidacy. Violators shall be fined not more than $1,000 or imprisoned not more than one year, or both. Willful violation carries a maximum fine of $10,000 or two years in prison, or both.
>
> 18 U.S.C. §600 prohibits promise or special consideration for employment, position, compensation, contract, appointment or other benefit made possible by an Act of Congress to any person in return for any political activity, or the support of a candidate or political party. Violators of this section shall be fined not more than $10,000 or imprisoned not more than one year, or both.

18 U.S.C. §601 prohibits causing any person to make a contribution for the benefit of any candidate or political party through the denial of deprivation of any employment, position, or work with an agency of the federal government. A maximum fine of $10,000 or imprisonment of not more than one year, or both, shall be levied against violators.

18 U.S.C. §602 makes it unlawful for a candidate for Congress, elected representative, employee or officer of the federal government to knowingly solicit contributions, within the meaning of section 301(8) of the Federal Election Campaign Act of 1971, from any other officer, employee or person. Any individual in violation of this section shall be fined not more than $5,000 or imprisoned not more than three years, or both.

18 U.S.C. §603 prohibits any officer or employee of the United States from making any contribution to any other officer, employee, Senator or Representative, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Violators are subject to a fine of not more than $5,000 or three years in prison, or both.

18 U.S.C. §604 prohibits solicitation or receipt of any assessment, subscription or contribution for any political purpose, from any person known to be receiving or entitled to compensation, employment or benefit generated by Congressional appropriation for work relief purposes. Violators shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. §605 prohibits the disclosure, for political purposes of the names of persons on relief, to a political candidate, committee, or campaign manager, or the receipt of such a list. Violators shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. §606 prohibits officers or employees of the United States from discharging, promoting, or degrading the rank of any other officer or employee for giving, withholding, or neglecting to make a political contribution. Violators shall be fined not more than $5,000 or imprisoned not more than three years, or both.

18 U.S.C. §607 makes it unlawful to solicit or receive any contribution in a room or building occupied in the discharge of official duties by any person mentioned in section 603 above. Any person in violation shall be

fined not more than $5,000 or imprisoned not more than three years, or both.

Expansion of the Competitive Service.

At the time the Hatch Act was passed, only about 10% of all federal employees were covered. Now there are few employees who are not covered and the Hatch Act reform bill will continue such broad coverage. Further, 5 U.S.C.§1308 requires that Congress be provided with an annual report setting forth a statement in the administration of the competitive service, the rules and regulations and exceptions thereto in force, the reason for exceptions, etc. Section §3302 gives the President sole discretion for providing for necessary exceptions of positions from the competitive service and thus, possibly from Hatch Act coverage.

Government in the Sunshine Act, P. Law. 94-409, 5 U.S.C. §552b, and the sunshine provisions of other various statutes.

Freedom of Information Act, 5 U.S.C. §552

Federal Election Campaign Act Amendments of 1984, P. Law 93-443, 88 Stat. 1263.

Includes public financing of presidential election and limits contributions and expenditures for federal candidates.

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Statement of Hon. William L. Clay
before the
Senate Committee on Governmental Affairs
on
S. 135, Hatch Act Reform Amendments of 1989
July 25, 1989

Mr. Chairman, I appreciate the opportunity to present my views on legislation to reform the Hatch Act. My comments will be brief. This legislation has already received considerable consideration by the Congress. It is time now to act on it.

In the last Congress, the groundwork for enactment of Hatch Act reform legislation was set. With the unanimous support of the Republican members of the House Committee on Post Office and Civil Service, we finally reached a bipartisan compromise. The compromise both protects federal employees and the public against any intimidation by government officials while protecting the First Amendment rights of federal workers to freely engage in lawful political activity. That bill, H.R. 3400, was passed overwhelmingly by the House in November, 1987, by a vote of 305 to 112. Unfortunately, the Senate, despite the last minute efforts of Senator Deconcini, failed to act on Hatch Act reform legislation before the end of the 100th Congress.

In the 101st Congress, my colleague Congressman Frank Horton and 308 cosponsors joined me in reintroducing this legislation (H.R. 20). In April the House again considered legislation to bring needed reforms to the Hatch Act and passed H.R. 20 by an overwhelming vote of 297 to 90. S. 135, which you are considering today, embodies principles similar to H.R. 20.

As I testified 2 years ago before this Committee denying any citizen the right to free and full participation in the political process is a contradiction in a democratic government. This is what the Hatch Act has done for the past 50 years. Both H.R. 20 and S. 135 restore these First Amendment rights to 3 million federal employees.

For 50 years the Hatch Act has done more to trample on the rights of federal employees to fully engage in all legal political activity than it has done to protect those rights. The most recent example was the case of federal workers in the State of Washington. Puget Sound civilian naval employees, like other federal workers, attempted to participate in the 1988 Washington State presidential caucuses. These workers attended caucuses in Washington, but because the Hatch Act forbids them from speaking at these caucuses they all wore gags. These same federal employees are also forbidden to run as delegates for any political convention. As a consequence, Bush lost delegates to Pat Robertson supporters. While President Bush may have been hampered in Washington State, he certainly benefitted in Massachusetts when a barrage of state police officers appeared with him to support his presidential efforts. There should be no distinction between state and federal employees as far as political rights are concerned.

Another absurdity of the current Act as it is presently enforced is the apparent bias with which the Act is applied. The last administration used the Act to go after three union presidents who had been on leave from their government positions for many years because they expressed personal opinions in the 1984 presidential election in their newsletters. After a long, drawn out, four year fight, the courts vindicated all three and the Solicitor General announced earlier this year that his office did not intend to appeal the federal courts' decisions. At the same time, the Federal Trade Commission, according to an article in the *Federal Times*, apparently condoned clear violations of the Hatch Act where those violations were made on behalf of George Bush's campaign efforts against Michael Dukakis.

In the end, the Hatch Act has been an effective weapon for preventing honest government workers from exercising rights supposedly guaranteed the First Amendment. Impossibly convoluted regulations and haphazard and arbitrary enforcement have served to convince most federal workers that they are better off staying out of the election process altogether. While deterring honest citizens from exercising their First Amendment rights, the Hatch Act has failed miserably as a deterrent to those who would seek to use the federal government as a vehicle to reward political friends or punish political enemies. One has only to review the recent history of this country to realize how impotent the Hatch Act has been. The Hatch Act does not prevent political appointees from using the instrumentalities of government to destroy political enemies. And as the current scandal at the Department of Housing and Urban Development illustrates, it has done little, if anything, to prevent dishonest officials from seeking to reward political friends.

One of the principle benefits in reforming the Hatch Act is to ensure that we have a meaningful law that both discourages this kind of abuse and punishes those who engage in it. That is not what the Hatch Act does today. More preoccupied with the size of a campaign poster in a postal worker's front yard or whether or not an agricultural agent is running for secretary of the local Democratic party, the Hatch Act has been virtually useless as a weapon for discouraging the unlawful distribution of political patronage. In short, while muzzling the honest federal worker, it allows the dishonest political appointee to act as a law unto himself. I am absolutely unconcerned about what an employee at the CIA or FBI may lawfully do on their own time in support of a candidate or political party. I am extremely concerned about what a dishonest employee may do on official time to seek to intimidate or bribe private citizens or other federal workers. In my view we are far better served by a law that is specifically focused at those who seek to misuse their federal position than we are by one that simply gags otherwise honest citizens.

My principle purpose in seeking reform of the Hatch Act, however, is to ensure that federal workers, no less than any other citizens, have the right to lawfully participate in the selection of their government. Right now federal employees have no more rights, and in the case of the Hungary and Poland, even fewer rights than those behind the iron curtain. Citizens in Russia, like American federal and postal workers, have the right to vote, but like American federal and postal workers, that right is rendered meaningless because they are prohibited from participating in the process of selecting candidates. It is absolutely disgraceful that we, as elective representatives, should have no more respect for the dignity and rights of our own employees than the dictators of the Soviet Union show for theirs.

As I said at the outset, this reform legislation has received extensive study and deliberation. Reform legislation has had 15 hearings in the House alone. In addition, it has now been considered by the full House on 6 occasions. The original Hatch Act never received careful consideration, it was passed quickly without public hearings or extensive debate. Reform of the Hatch Act will return to 3 million federal employees their First Amendment rights. I urge the Committee to expeditiously act on this legislation.

Statement of
Senator DENNIS DeCONCINI

Mr. Chairman: I appreciate being afforded the opportunity to testify today in support of S. 135, the Hatch Act reform legislation. I am especially pleased that we have a freestanding Hatch Act bill in the Senate this session. This is due to your leadership, Mr. Chairman, and that of Senators Stevens and Pryor.

I congratulate you, Mr. Chairman, for holding these hearings on an issue which is so important to this nation's nearly three million Federal and postal employees. The bill you are considering today is similar to that which was passed by the House of Representatives on April 17, 1989 by a vote of 297 to 90. I would also like to congratulate Representatives Clay and Horton for their diligent work in getting early action in the House on this significant issue.

Mr. Chairman, today the Senate begins addressing the question of Hatch Act reform. The legislation which passed the House so strongly is not revolutionary by any stretch of the imagination. As I have said before, this legislation does not "repeal" the Hatch Act as many of its critics would have the citizens of this country believe. Instead, it clarifies and strengthens a law which has confused and befuddled Federal employees for fifty years.

While the original premise for passage of the Hatch Act was to protect the Federal worker from political coercion, today it is seen as a bureaucratic jumble of conflicting and confusing regulations which has the effect of freezing-out Federal and postal employees who might try to exercise the few political rights which they are guaranteed.

I cannot blame them for opting out of a system which says that you can wear a button for a political candidate, but you cannot pass them out. Or that says you can sign a nominating petition, but you cannot circulate a petition yourself. This confusion is compounded and the law belittled when, in the name of the Hatch Act, regulations are implemented stating that a political campaign sign no larger than 15 inches by 30 inches can be placed on an individual's car, and that lawn signs for a candidate can be no larger than 14 by 22 inches. These trivial regulations render the Hatch Act ludicrous.

Mr. Chairman, last year I used the example of a postmaster in my state of Arizona who spends a portion of his time patrolling a postman under his supervision. This postman has a relative who is a county sheriff and another relative who is a judge. During his off-duty time, the postman understandably wants to help get his relatives re-elected. As a result of the Hatch Act, however, this man's supervisor must spend part of his time -- time that is better spent on making certain the mail is delivered on a timely basis -- ensuring that his employee does not run afoul of the Hatch Act. This postmaster, like so many Federal and postal employees in my state, wants me to do what I can to see that this out-dated law is changed.

The bill that is before us is a good, solid, bipartisan piece of legislation. It simply allows Federal employees to voluntarily exercise their First Amendment rights and engage in political activities on their own time. The two key ideas here are "voluntarily" and "their own time." This nation's Federal employees are intelligent enough to know if they are being buffaloed. They work hard during the day and will not allow someone else to tell them how they should spend their leisure time.

The Senate bill, of which I am proud to be a cosponsor, is simple in its application and its reforms. It prohibits Federal and postal employees from engaging in any partisan political activities on the job, in a uniform, or in a government vehicle or building but allows these employees the choice to engage or not engage in political activities in their off-duty time. Currently the law has been interpreted to allow certain employees to wear campaign buttons at work. This practice would be prohibited under the Senate bill. Other ambiguities in the current regulations are also remedied.

Similarly, the Federal employees of this nation understand the rules and regulations which govern their activities. I know this because they tell me loudly and clearly when Congress tampers with their benefits or tries to change their retirement. Under a reformed Hatch Act, they would know if someone tried to coerce them to either contribute to a candidate or engage in political activity on the job. They would not let someone else do something to spoil one of their hard-earned benefits or make life difficult for themselves and their peers. Further, under a reformed Hatch Act, an employee would know where to go to stop subtle coercive pressure from supervisors.

These specific prohibitions make a reformed Hatch Act self-policing. A simplified Hatch Act would provide postal and Federal employees the opportunity to make their concerns known to their elected representatives - if they choose to do so.

Today, nearly 80% of all Federal civilian jobs are covered by the impartial system of merit and examination. The education level achieved by government workers is at an all-time high, with approximately one-third possessing at least a bachelor's degree.

Some feared that this large body of federal workers could be mobilized to work for a particular individual or party. The fact that the vast majority of civil service jobs fall under the merit system nullifies this concern. As a matter of fact, it was the Reagan Administration which chose not to comply with the courts' requirement to formulate full and fair civil serviceexaminations for employment applicants. According to OPM, about 40% of the people hired in recent years - almost 4,000 employees in 1987 - were hired without the benefit of competitive examination. I find it odd that many who have loudly voiced their fear of a "politicized" system, potentially created under a reformed Hatch Act, have been the beneficiaries from the loophole in the civil service system which allows many political appointees.

This legislation provides strong penalties for violations of the reformed Hatch Act. I have long believed that clearly defined penalties are the best deterrent against breaking particular laws.

Thus, the bill before us today is a good bill. It clarifies the distinction between what "on" and "off-duty" activities are allowed. It specifies the penalties for violations of the Act. It strengthens the merit system and enhances the self-policing aspects inherent in the bill. Most importantly, it improves the American political process by allowing one of the most politically engaged segments of the population access to the country's political system.

To allay the concerns of some critics of Hatch Act reform, I believe that the Governmental Affairs Committee might consider establishing a clear and concise definition of the term "political activities" so that the intent of Congress is not left to other groups to decipher.

Similarly, the Committee might review the enforcement provisions for violations of the Act to ensure they function as a forceful deterrent to the possible wrongdoer.

Finally, as I alluded to earlier in my testimony, the merit system could be tightened to cover the greatest number of Federal positions possible. The slipshod manner in which the Reagan Administration hired so many employees must be avoided at all costs by future Administrations I am confident that under the direction of Constance Newman, the Office of Personnel Management will be able to effectively address this issue of hiring people without benefit of merit evaluation.

Attention to these few details could strengthen the Hatch Act reform legislation now before the Committee and emphasize its non-revolutionary aspects for those who may have qualms about reform.

In conclusion, Mr. Chairman, I urge my colleagues in the Senate to stop treating America's Federal and postal employees as "second class" citizens and to embrace this Hatch Act reform legislation. On balance, it is good, bipartisan legislation which would restore long denied First Amendment rights to a group which daily serves this nation. To those who fear that Hatch Act reform will bring coercion, I would state that coercion takes many forms and is undoubtedly present today under this ill-defined and arbitrary law. Instead, let us support good government, fair government, and equitable government.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

July 24, 1989

Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for giving us the opportunity to express the views of the Department of Justice on S. 135, the "Hatch Act Reform Amendments of 1989." The Department strongly opposes legislation that would reduce the current restrictions on partisan political activity by federal civil servants. 1/ Senior advisors to the President would recommend a veto of this bill if it were presented to the President.

Our opposition is grounded in a firm belief that it is impossible to allow active partisan campaigning by the vast majority of federal employees and, at the same time, protect two fundamental principles central to the operations of the Executive Branch of the Federal Government: the nonpartisan administration and enforcement of federal laws, and advancement in the federal civil service based solely on merit.

If enacted, S. 135 would repeal substantial portions of the Hatch Act, 5 U.S.C. § 7324 ("the Act"), which forbids certain active partisan political activities on the part of federal employees (and certain state employees whose positions are funded by federal grants). 2/ We believe that such a course would be a

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1/ S. 135 is essentially identical to the final version of H.R. 3400, the "Hatch Act Reform Amendments of 1988," considered by the 100th Congress, and also opposed by the Department.

2/ In 1974, Congress repealed most of the federal restrictions on partisan campaigning by state and local employees who administer federal programs imposed by the 1940 "Little Hatch Act." See 5 U.S.C. § 1501 et seq. By this time, most of the states had enacted legislation protecting public employees against political abuses and, thus, the federal bar had become superfluous. We are aware of no major policy shift at the state level backwards, toward the universally

(continued...)

serious mistake because we remain convinced that it would result in a tragic re-politicization of the federal civil service to the detriment of the vast majority of federal employees, as well as to the public policies and programs that they implement. [3] This, in turn, would seriously jeopardize public confidence in government and increase demands on already overburdened prosecutorial resources.

I. The Hatch Act

While the purpose of S. 135 is to restore the right to participate in the Nation's political processes to federal employees, in fact, federal workers already have significant political rights under the current Hatch Act. For example they may:

- register to vote and vote;
- contribute money to partisan political campaigns;
- express their views in private and in public (though not in a concerted way to elicit support for a candidate or party);
- run as an independent candidate in certain partisan contests in designated areas with a high concentration of federal employees;
- attend political conventions and rallies as a spectator;
- assist in nonpartisan voter registration drives;
- campaign for or against political referendum questions;
- participate as a nonpartisan poll-watcher or election judge;

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[2] (...continued) discredited political "spoils" system. On the contrary, the trend today in public administration at the state and local level continues toward a more merit-based, and less political, civil service.

[3] Similar legislation has been passed by the House of Representatives as H.R. 20, which resembles the original House version of H.R. 3400 in the 100th Congress. While there are some significant differences in the proposals, the Department of Justice opposes enactment of H.R. 20 for many of the same reasons that it opposes S. 135.

- attend political fund-raising functions;
- wear political buttons (off duty or, subject to certain agency restrictions, on duty); and
- participate in nonpartisan campaigns.

However, federal employees may not take an active role in partisan political activities. Specifically, the Hatch Act forbids employees to:

- run as partisan candidates in elections for public office;
- hold office in political clubs or parties;
- solicit or handle political contributions or organize partisan fund-raising activities;
- make speeches or engage in other campaign activities to elect partisan candidates as an agent of the candidate's campaign organization; and
- circulate partisan nominating petitions.

II. S. 135, the "Hatch Act Reform Amendments of 1989"

If it were enacted into law, S. 135 would amount to a virtual repeal of the Hatch Act. It would permit federal employees to:

- hold office in a political party;
- work in partisan political campaigns or in party organizations;
- publicly endorse partisan candidates and urge others to support them; and
- solicit political contributions from fellow federal employees in certain circumstances.

The Hatch Act was passed in 1939, but its roots are much deeper. For example, the political activities of some of those in the Executive Branch disturbed Thomas Jefferson, who issued an order stating in part that, "[t]he right of any officer to give his vote at election as a qualified citizen is not meant to be restrained . . . [however] it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." [4]

In spite of Jefferson's concerns about mixing partisan politics and regular federal service, the political spoils system flourished in succeeding decades and remained the rule until after the Civil War. In 1871, Congress authorized the President to establish a true civil service of federal employees. [5] This was followed by the Civil Service Act of 1883, known as the Pendleton Act,[6] which in Rule 1 declared that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any right to use his official authority or influence to coerce the political action of any person or body." [7]

Problems with political activity by government workers continued, and the Civil Service Rules were frequently revised. In 1907, under President Theodore Roosevelt, Rule 1 was amended to prohibit executive civil servants from using their "official authority or influence for the purpose of interfering with an election or affecting the result thereof." [8] Finally, the experience of the 1936 and 1938 elections convinced Congress that the prohibition against taking an active part in political management and campaigns should be extended to the entire federal service. [9] The bill introduced to remedy this problem became the Hatch Act, named for its main proponent, Senator Carl Hatch (D-NM). [10] It has since been amended on several occasions, but its essential features have remained intact for almost 50 years.

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[4] 10 J. Richardson, Messages and Papers of the Presidents 98 (1899), quoted in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 557 (1973) (dismissing a constitutional challenge to the Hatch Act as a violation of the First Amendment). Justice White presented a concise history of the Act in this opinion, id. at pp. 557-63, from which this discussion is largely drawn.

[5] 16 Stat. 514.

[6] 22 Stat. 403.

[7] 22 Stat. 404.

[8] Twenty-fourth Annual Report of the Civil Service Commission 104 (1908), cited in Letter Carriers, supra, 413 U.S. at 559.

[9] Earlier civil service rules had been confined to the competitive classified service. Id.

[10] 53 Stat. 1147.

The principle that the privilege of federal employment constitutionally justifies restrictions on partisan political activity also has been twice expressly recognized by the Supreme Court. In United Public Workers of America v. Mitchell, 330 U.S. 75, 98 (1947), the Court upheld the constitutionality of the Hatch Act and noted that, "Congress recognizes danger to the [civil] service in that political rather than official effort may be channeled through political connections." In United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 565-67 (1973), the Court noted that "[n]either the right to associate nor the right to participate in political activities is absolute," and found that Congress was justified in concluding that "substantial barriers should be raised against the party in power -- or the party out of power, for that matter -- using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns."

We believe that the changes proposed in the Senate bill, even more than those proposed in the House version (H.R. 20), would invite an unacceptably dangerous degree of politicization in the federal workplace. 11/ The types of conduct involved could run the gamut from informal political commentary to

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11/ Although similar, S. 135 and H.R. 20 differ in several significant respects. For example, H.R. 20 appears to allow some off-duty solicitation of political contributions, while the Senate bill would specifically allow free solicitation among employees who are members of the same federal employee organization for the purpose of supporting the organization's multicandidate political committee. (See § 7323(2)). On the other hand, H.R. 20 would allow federal employees to run for public office in a partisan election and even creates an entitlement to unpaid leave in order to allow the employee to do so. (See H.R. 20, § 7326) S. 135 would prohibit such activity.

In two important respects, H.R. 20 includes important provisions lacking in S. 135: (1) H.R. 20 would prohibit the partisan use of "official information obtained through or in connection with" federal employment unless the official information is available to the general public (See H.R. 20, § 7323(b)); and (2) H.R. 20 defines the nature of "official authority or influence," the partisan use of which is prohibited by both bills, to include promising to confer and conferring any benefit (such as any compensation, grant, contract, license, or ruling), or threatening reprisals (such as deprivation of any compensation, grant, license, or ruling), and approving, recommending processing, or taking personnel actions. (See § 7323(c)).

outright pressure on subordinates to "volunteer" to help in a campaign or contribute to an election fund. Of great concern to us, in particular, is proposed § 7323(2), which would permit federal employees belonging to federal employee organizations to solicit and receive contributions from fellow union members for the organization's multicandidate political committee. Such activities are federal crimes under current law. 18 U.S.C. § 602 makes it a crime to solicit, and 18 U.S.C. § 603 makes it a crime to make, any prohibited political contribution. This dual prohibition is intended to assure that employees are doubly shielded from coercive political shakedowns.

While it may be argued that by becoming members of employee organizations, the affected federal employees have agreed to expose themselves to such activities, this is not necessarily the case. The decision to join a federal employee union should not have the result of subjecting them to unwanted pressures from which they would otherwise have been immune. Further, in addition to deepening the gulf between federal employee organization members and non-members, this distinction between when solicitation either is or is not a crime, depending upon individual employee affiliation, will be extremely difficult to enforce. Moreover, prosecutions of infractions of these laws could be expected to multiply, since opportunities for conduct which might be a violation would be substantially increased.

The current bill includes several provisions, specifically §§ 7323(1) and 7324, which, although theoretically intended to prevent abuses, will be ineffective in achieving that goal as a practical matter. Further, these provisions would be virtually impossible to enforce effectively, and could invite a flood of litigation by disgruntled employees. In our view, these prohibitions would add little other than confusion to existing statutes which make certain kinds of coercion and misuse of authority a criminal offense. 12/

It is important to emphasize that the Department's role in matters involving political corruption of public personnel and programs is generally confined to criminal prosecution of aggravated violations of federal criminal statutes. See e.g., Chapter 29 of Title 18 of the United States Code. The development of factually significant cases in this area suffers from two major problems. The first problem lies in the fact that individual victims of patronage schemes rarely come forward, either because the victims agree with the politics of the person pressuring them, are part of the same political machinery, or because the relative "cost" of submission on an individual level is low (i.e., stuffing political mailings or purchasing a $50

12/ See, e.g., 18 U.S.C. §§ 595, 598, 600, 601, 602, 603, 606, and 607.

fundraising ticket compared to the possible cost of complaining and displeasing their supervisors -- possibly jeopardizing their jobs).

The second major problem the Department must overcome to prosecute successfully these types of crimes is the fact that political threats and intimidation are rarely communicated in clear and unambiguous terms. The issue of coercion is invariably subtle. The prosecutor must therefore attempt to identify additional witnesses who can testify that they also received similar "threats" from the identified suspect. Our experience over the years is that when patronage abuses are actually reported they generally involve isolated instances, and often disgruntled employees, who complain of adverse job consequences by their supervisors because of their failure to comply with political demands imposed upon them. Such one-on-one-witness cases are not conducive to criminal prosecution in federal court. The absence of large numbers of federal criminal prosecutions of patronage corruption thus does not indicate that the problem does not exist, but that it is generally extremely hard to prove.

The experience which this Department has had over the years enforcing the criminal laws dealing with illegal patronage practices has demonstrated quite graphically that there is a definite -- and sinister -- link between lack of civil service protections, on the one hand, and the occurrence of abuse on the other. The dynamics by which most government offices operate -- and the fact that all government offices are in the last analysis subordinate to the political process -- inevitably leads to the strong temptation on the part of many senior public administrators to use subtle, and often overt, pressure to transform the rank and file implementors of public programs and policies into political cadres. It is imperative that these forces be checked. The fact that such abuses are comparatively rare in the federal system, but not uncommon in many state and local government agencies, is a telling testament to the wisdom, efficacy, need, and purpose of the present federal Hatch Act.

Several examples of patronage abuses at the state and local level which have been investigated by this Department in the very recent past will illustrate the magnitude of the problem the Hatch Act has successfully kept from the federal door step:

- In 1975, Congressman J. Edward Roush of Indiana testified before a House subcommittee in support of increased penalties under 18 U.S.C. §§ 600 and 601, at which time he provided the Congress with several examples of specific written demands from the party in power in his home State to rank and file government personnel (many of them firemen, road laborers, and the like) for the political donation of a percentage of their government salaries.

* In 1985, a Special Federal Grand Jury in the Northern District of Illinois (Chicago) issued a report on the dynamics of the fraudulent election practices for which Chicago has until recently been infamous. After several years of hearing testimony, and after returning over 65 indictments charging Chicago officials with fraudulent voting practices, this grand jury determined that the driving force behind voter fraud in Chicago was the quest for patronage -- e.g., the power of the winning political faction to control the jobs of rank and file municipal personnel and award benefits to its "friends." This vicious patronage system produced corrupt government, and required aggressive political work by even the most mundane public employees in order to obtain -- or retain -- municipal jobs.

* Two County Commissioners in Clark County, Indiana were indicted and convicted in Indianapolis during 1986 for overtly threatening a large group of highway laborers with the loss of local County jobs if they did not agree to make political contributions to the party in power. Several laborers who refused to contribute were either summarily fired, or simply left their jobs on their own accord knowing that termination was the inevitable consequence of refusing to go along with such demands. This investigation also uncovered several other situations where Clark County employees -- including at least one paramedic -- were punitively transferred to job sites that were far removed from their homes and children because of the employees' lack of support for the incumbent political faction.

* During recent months, the Criminal Division has transferred two major patronage matters to the Office of Special Counsel (OSC) for administrative enforcement under the so-called "Little Hatch Act" (5 U.S.C. §§ 1501 et seq.) Extensive criminal investigations, however, failed to produce sufficient evidence to support criminal charges in these cases -- mainly for the reasons summarized previously in this letter. Both of these matters involved superior political appointees soliciting political contributions -- usually in the form of dinner tickets -- from clerks and administrative personnel. In one of these cases OSC succeeded in obtaining meaningful penalties (including debarment from future public employment) against the Director of Personnel of the Akron Municipal Housing Authority and two of her subordinates. See Special Counsel v. Parnell, 37 M.S.P.R. 184 (1988). In the other case, OSC is presently seeking similar penalties against several political and senior supervisory

employees of the Niagara Frontier Transportation Authority for doing much the same thing. In both these instances, OSC has be successful in obtaining administrative sanctions against plainly unlawful behavior largely because the Little Hatch Act is on the books, and the evidentiary requirements of this administrative statute are far less demanding than those applicable to criminal proceeding under statutes such as 18 U.S.C. §§ 600, 601 and 595.

* As a result of OSC's recent successes in this regard, the Criminal division is actively engaged at the present time in seeking ways to include OSC in the overall enforcement of the Federal patronage laws on the local and State level. Accordingly, the number of administrative cases such as the ones just discussed can be expected to increase in the near future -- if, of course, S. 135 does not pass and the Hatch Act remains an effective enforcement tool.

* Two months ago, at the end of May, 1989, a federal grand jury in Newark indicted the incumbent mayor, and an incumbent city councilman, of the township of Guttenberg for terminating the services of two exemplary police officers, and a 76-year-old school crossing guard. These public servants had refused to perform partisan political services for the incumbent city administration. This case, which is presently awaiting trial in Newark, was made possible because of the willingness of at least three of the victims to come forward and complain directly to the United States Attorney in Newark, through an "800" telephone number which the District of New Jersey has recently put in place.

This recent history supports our firm conviction that any relaxation of the Hatch Act's politicking ban will substantially diminish the protections which federal employees currently enjoy against political pressure, while affording no realistic expectation that the void thus created can be filled by the federal criminal justice system. The Department of Justice remains convinced that nothing short of an absolute bar on active partisan political activities by federal civil service employees will adequately protect the public's interest in the fair and impartial administration of government programs and policies, and the employees themselves from more or less subtle pressure by their superiors. As noted above, violations of the criminal laws outlined above are notoriously difficult to prosecute because coercion in the workplace is hard to prove. Attempted coercion usually occurs out of sight of any witnesses, when none other than the alleged victim and perpetrator are present. The line between conduct that amounts to pressure and conduct that does not is very fine. Experience has shown that the only way to prevent abuse in this area is by declaring the entire field off-limits.

In addition to the specific concerns outlined above, the overall effect on the general public's confidence in the fair and impartial administration of the laws could be devastating, particularly if federal employees performing law enforcement or other sensitive government functions are not exempted from the proposed relaxation of the Hatch Act requirements. If it appears that an official of Party A has misappropriated funds, it will not inspire public confidence to learn that the local U.S. attorney's office charged with investigating the allegation is headed by that official's campaign manager -- or, in contrast, by the campaign manager for the candidate the official defeated. 13/ If a federal agency's employees' PAC endorses a presidential candidate, and he loses the election, the public will justly wonder how faithfully that department will carry out the new President's programs. If an agency manager goes on record supporting (even through a "multicandidate political committee"), a candidate who proves successful at the polls, and subsequently that agency manager is promoted, it will surely promote increased public cynicism.

Furthermore, the increased political clout of public officials who might also serve within the hierarchy of national political committees should not be underestimated. For example, although he could not himself run for office under S. 135, the head of the Federal Election Commission could be the National Chairman of one political party or the other. This surely would not inspire confidence by members of the opposite party in that official's ability or desire to impartially administer the election laws.

13/ It should be noted that the Department of Justice currently imposes its own rules, more stringent than the Hatch Act, which would prohibit a U.S. Attorney from engaging in such activities, even if the Hatch Act were repealed. The Department of Justice holds even its presidential appointees to the standards which apply to the rank-and-file, reasoning that the public's faith in fair and impartial law enforcement requires them to shun every appearance of partisan politics. See Memorandum from Attorney General William French Smith to all Department of Justice Offices, Boards, Divisions, and Bureaus (Feb. 13, 1984) (advising all Department of Justice employees, even those exempt from the Act, to refrain from participating in partisan politics). However, leaving such regulation to departments and agencies alone is undesirable because such rules can be easily changed and could produce uneven results.

The list could go on and on. Two principles central to the operation of the Executive Branch -- the impartial, nonpartisan administration and enforcement of federal laws, and advancement in the federal service based solely on merit -- would certainly be threatened and could well be extinguished by the adoption of S. 135. Safeguards against real abuse would be virtually unenforceable. In short, S. 135 is an open invitation to political corruption.

Finally, in addition to the policy and practical concerns discussed above, S. 135 raises serious constitutional concerns insofar as it limits the ability of most senior political appointees to engage in political activity. For example, § 7324 would place sweeping restrictions on the ability of many senior presidential appointees, the individuals primarily responsible for implementing the President's program, to engage in "political activity" while "on duty." We take little comfort from the fact that this prohibition does not apply in the case of the highest level appointees and presidential aides (those paid from the Executive Office of the President appropriation or appointed with the advice and consent of the Senate), if "the costs associated with that political activity are not paid for by money derived from the Treasury of the United States." (See § 7324 (b)(1)). This qualification is of very uncertain value given that effective implementation of a President's program depends upon many non-cabinet level appointees, that all appointees' salaries are ultimately paid by the Treasury, and given that a wide variety of official activity of these appointees might be regarded as "political." The term "political activity" is nowhere defined in the Bill. There is, for example, no suggestion in the proposal that this term was intended to include only the kinds of partisan campaign activities for which appropriated funds may be unavailable under existing law. Restrictions on the partisan political activity of such high level government officers is questionable under both Article II of the Constitution (as an impediment to the exercise of legitimate Executive authority), [14] and the First Amendment. [15]

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[14] Supreme Court precedent establishes that Congress may not interfere with the President's ability to carry out his constitutional responsibilities. See, e.g., Hart v. United States, 118 U.S. 62 (1886); United States v. Klein, 79 U.S. (13 Wall.) 128 (1872), holding unconstitutional congressional attempts to interfere with the President's pardon power. Even when Congress acts pursuant to its appropriations power, its authority is not absolute. Congress may not, for example, use its appropriations power to establish a religion, Flast v. Cohen, 392 U.S. 83, 104-105 (1968), or to diminish the compensation of federal judges, United States v. Will, 449 U.S. 200 (1980). By the (continued...)

In sum, we conclude that an unintended but nevertheless certain result of this legislation would be to seriously undermine the nonpartisan nature of the federal workforce. Ultimately, S. 135 would lead to the re-politicization of the federal civil service, and an unfortunate retreat into the very worst aspects of public administration from the last century. One of the justifications given in 1939 by Senator Carl Hatch for restricting the political activities of civil servants applies to the same extent today: It is simply impossible to draw the line between voluntary and coerced political activity. 86 Cong. Rec. 2626 (1940) ("I defy . . . [anyone] to draw that line"). Allowing political activities by the federal civil service will inevitability harm the merit civil service and the people our Government serves.

For these reasons, the Department strongly opposes this legislation. The Office of Management and Budget has advised that there is no objection to the presentation of this report to the Congress and that S. 135 is not in accord with the program of the President.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Assistant Attorney General

14/ (...continued)
same token, Congress' appropriations authority may not be used to intrude upon the President's Article II powers.

15/ *See*, *e.g.*, *Branti v. Finkel*, 445 U.S. 507, 519 (1980) (recognizing the distinction between ministerial and policymaking officials); *Elrod v. Burns*, 427 U.S. 347, 367-69 (1976) (recognizing that different First Amendment considerations apply to policymaking officials as opposed to nonpolicymaking employees).

NATIONAL
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OF FEDERAL
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NFFE

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STATEMENT FOR THE RECORD

BY

THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES

BEFORE

THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON

HATCH ACT REFORM AND

S. 135

JULY 25, 1989

Mr. Chairman and Committee Members:

On behalf of the National Federation of Federal Employees, I appreciate the opportunity to submit testimony to the Committee on the Hatch Act and the need for its reform. NFFE represents over 150,000 Federal workers in more than 40 Federal agencies, and is thus particularly concerned about the need for improvement in the political activity rights of these employees.

In 1939, Congress approved a bill sponsored by Senator Carl Hatch which prevented Federal workers from running for public or party office at any level and from participating in any partisan political campaigns, either as volunteers or paid employees. The Act was originally intended to correct alleged abuses of the merit system that arose with the growth of the Federal Government and the popularity of President Franklin D. Roosevelt during the New Deal. At a time in history when a staggering number of Americans were unemployed and a hefty number of civil service jobs were filled through patronage, the restrictions contained in the Act made some sense.

I think we can all agree that times have changed since then, however. To begin with, the Federal Government has tripled in size to meet the needs of our country's expanding population. The Hatch Act no longer proscribes the political activities of just a fledgling workforce. There are now nearly three million Americans who are unable to exercise their political rights because of Hatch Act regulations.

Federal employees now qualify for their civil service jobs under the merit system, an effective form of protection in itself. Designed to protect employees from political coercion, the merit system renders the draconian restrictions of the Hatch Act obsolete. Supervisors and subordinates alike are aware of what is expected for each position, and the workforce has by now gained enough sophistication to know when political pressure is being applied.

Instead of offering employees their only protection against political coercion, the Hatch Act of 1939 has left a legacy of misapplication and penalties its framers never intended. The Hatch Act has been interpreted in such a manner that Federal employees are precluded from virtually all political activities. The law forbids employees from campaigning for candidates in partisan elections, making campaign speeches, distributing campaign material in partisan elections, and collecting contributions for any partisan candidate. Interpretation has become so restrictive that the very employees the law was intended to protect have been penalized instead.

For example, during the 1984 election campaign, the President of NFFE Local 1765 at the Veterans Administration Hospital in Leavenworth, Kansas was threatened with discipline by management for signing her name to postcards which endorsed a political candidate. What makes this particular situation ironic is that the employee originally was not involved in the campaign, but offered to fill in for her politically active husband who had suddenly become ill. The NFFE member was unaware that she was under any restrictions because she had never been so informed by management.

After a lengthy investigation by the Office of Special Counsel, the complaint against the employee was dismissed. The OSC said the agency had been deficient in providing guidance to the workers on the Hatch Act. In addition, several other employees, including management officials, were found to be participating in similar political activity without being similarly accused. NFFE representatives suspected that the agency could have been using the incident as an excuse for disciplining a worker for union activity.

Another case involves an NFFE member from Atlanta, Georgia who belongs to a folk dancing group. She called NFFE Headquarters to find out if there would be any problem if she appeared as part of the dance troupe when it performed for delegates to the 1988 Democratic National Convention. She noted that another union members was hoping to pick up a little extra cash tending bar at one of the convention hotels and that he was also concerned about any possible violation. NFFE staff offered to consult the Office of Special Counsel, since our experience has shown that even such harmless activities as those mentioned by the NFFE members are often construed as Hatch Act violations. True to form, the OSC determined that the two Federal employees would have to be able to offer evidence to *prove* that one frequently performed in folk dancing exhibitions and the other often tended bar, or those activities would not be allowed under the Hatch Act. The OSC was specific in listing as acceptable evidence: programs from previous folk dance exhibitions and pay stubs from bartending at other functions. I find it hard to believe that either of these two individuals would be swaying any of the Democratic delegates by pouring a drink or performing a folk dance. Yet the interpretation by the OSC was clear: only such activities that an employee would prove are habitual can be permitted in such a case.

Other situations brought to NFFE's attention show that the Hatch Act has had quite a chilling effect on the activities of Federal workers. One member in Davenport, Iowa has often expressed an interest in running for city council, but is prohibited from doing so because of the partisan nature of the office. Another member at NFFE Local 738 in Fort Leonard Wood, Missouri, was unable to assist in her husand's campaign for County Collector because of the Hatch Act. The same Local also has a steward who was interested in attending the Presidential caucus in 1984 as a supporter of a particular candidate. The employee heard through the grapevine, however, that management was aware of his activity, and that his presence at the caucus would provide them with the perfect excuse for firing a union official.

If an employee is found to be in violation of the Hatch Act, he or she could be fired. However, if the Merit System Protection Board (which adjudicates alleged Hatch Act violations) finds by unanimous vote that the violation does not warrant removal, a penalty of at least 30 days' suspension without pay is imposed. The severity of the punishment and the vagueness of the language describing appropriate activities have been intimidating to the Federal workers who wish to exercise their rights as citizens. Since Hatch Act "law" consists of hundreds of individual decisions, employees view it as a murky management tool, one "they" can use against you if it suits them. Many Federal employees have even refrained from voting in order to ensure that they would not violate the Act.

The problems with the Hatch Act are not newly discovered. In response to opponents of the Hatch Act, Public Law 89-617 was passed in 1966 to establish a bipartisan Commission on Political Activity of Government Personnel. The Commission recommended the restoration of Federal employees' First Amendment rights to political participation, but most of these recommendations have been ignored.

Reform of the Hatch Act has long been a necessity for Federal workers, and now it is close to becoming a reality. On April 17, 1989 the House of Representatives overwhelmingly voted 297 to 90 in favor of H.R. 20, the Hatch Act Reform bill introduced by Representative William Clay (D-MO). The legislation reduces the restrictions on political activity while protecting employees from coercion if their political views differ from those of their supervisor.

The House has sent a bipartisan message that the time for Hatch Act reform is now. NFFE would urge that the Senate make an identical statement supporting First Amendment rights for Federal workers by passing S. 135. This legislation is simple and effective: Federal employees would be able to behave as do all other citizens once they are off the job, off the clock, not wearing a Federal uniform or driving a Federal vehicle.

S. 135 would permit voluntary, off-duty political activities which do not interfere with the impartial administration of effective public service. At the same time, it would prohibit the use of official authority, influence or coercion with respect to the right to vote, not to vote, or to otherwise engage in political activity. S. 135 would prohibit employees from running for any partisan political office at any level. Further, S. 135 would prohibit employees from soliciting, accepting, or receiving political contributions from the general public or from fellow employees while in a government building.

Under no circumstances could money change hands for political purposes at the worksite or on work time. In fact, I'd be willing to bet that many employees would like to see *this* sort of protection when the high school band candy and cookie season rolls around again this year.

Finally, under the bill, the Office of Special Counsel of the Merit System Protection Board would continue to issue regulations and prohibitions concerning political activity. Criminal enforcement remains with the Justice Department. The MSPB could impose any penalty for actions brought by the Special Counsel under the general disciplinary action procedures of 5 U.S.C. Section 1207.

The First Amendment to the Constitution guarantees to all citizens of the United States the right to political participation. Since 1939, however, Federal workers' rights in this area have been severely restricted. Any reform of the Hatch Act must weigh both the employees' need for freedom of speech and their right to protection against political coercion. We believe S. 135 clearly provides this balance. We commend the Committee for its attention to this important issue of voters rights and look forward to working with you to ensure the passage of Hatch Act reform.

NATIONAL LEAGUE OF POSTMASTERS
OF THE UNITED STATES
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BACKGROUND INFORMATION AND POSITION OF THE NATIONAL LEAGUE OF POSTMASTERS ON HATCH ACT REFORM

The Hatch Act, "An Act to Prevent Pernicious Political Activities", was passed in 1939 in response to reports of politically-appointed managers in some agencies coercing employees and welfare recipients into doing campaign work and contributing money to candidates.

The Act prohibits political coercion or solicitation of or by federal employees, but also bars federal employees from voluntary participation in partisan political campaigns.

There have been repeated efforts to amend this ban on voluntary activities, on the grounds that it violates employees' First Amendment rights to free speech and association. In the mid - 1960's, the Commission on Political Activity recommended relaxation of this ban. Several lower federal courts found it unconstitutional. However, the Supreme Court in 1973 held that it was under the purview of Congress to determine the balance between individual rights and the public good in this case. Both Houses of Congress passed a Hatch Act reform bill in 1976 that would have permitted voluntary political activities, but President Ford successfully vetoed it.

In the 100th Congress, bipartisan legislation, H.R. 3400, was introduced to amend the Hatch Act to permit voluntary participation in political activities and at the same time protect the public and employees from improper coercion and solicitation. H.R. 3400 would:

- encourage federal and postal employees to exercise their right of voluntary political participation - on their own time, off the job, off the worksite
- prohibit use of official authority, influence or coercion with respect to the right to vote, not to vote, or otherwise engage in political activity
- prohibit solicitation of political contributions by superior officials
- prohibit political activity while on official duty, in federal facilities or in uniform
- require that employees who seek elective office do so on their own time, and that employees will, upon request, be granted leave to seek elective office
- subject violators to removal, suspension or lesser penalties determined by MSPB

Two days of hearings were held on Hatch Act reform bills previously introduced in the 100th Congress by Congressman William Clay (D-MO), H.R. 20 and H.R. 21, before the House Subcommittee on Civil Service. At that time, Administration and Postal Service officials testified in opposition to Hatch Act reform, and virtually all federal and postal employee and management groups testified in favor of reform.

Opponents of reform claim that the current law is fair and strikes the correct "balance" between individual rights and the public good; that any loosening of current restrictions would lead to a "politicized" workforce and to abuses on the job.

Proponents of reform, including the National League of Postmasters, argue that the Hatch Act is fundamentally unconstitutional, infringes on employees' First Amendment rights of free speech and association, shuts federal and postal workers out of critically important political processes, including campaigns, caucuses and conventions, through which decisions affecting their lives are made, and, in effect, makes them "second class" citizens.

Further, times have changed dramatically in the federal service since 1939. At that time, less than 32 percent of a workforce of 950,000 was under the merit system; today, 78.6 percent of a workforce of over 3 million is under the merit system. The "spoils system" of politically-determined job appointments and promotions is dead, replaced by a professional civil service where open competition for positions and promotion on merit and seniority dominate. Strong postal and federal unions have arisen, with collective bargaining rights in the Postal Service. The media is much more pervasive and alert to any hint of scandal. In short, the type of coercion which may have occurred in 1939 could never occur today.

In 1974, as part of a change in federal election law, restrictions were lifted on state and local government employees funded by federal monies. They are now allowed to participate in partisan political activities on their own time, but may not run for partisan office. In addition, 41 states allow their employees to engage in political activity. There has been no massive politicization of state and local governments, no significant increase in charges of coercion or improper activity. Why should federal employees be treated differently?

Since the hearings were held, changes were negotiated in the original legislation by Republican and Democratic House Post Office & Civil Service Committee members, with input from employee organizations, resulting in a unitary, bipartisan bill, H.R. 3400, which was introduced October 1, 1987.

This bipartisan bill attracted 292 cosponsors and was considered in the House of Representatives on November 17, 1987. After debate, the bill passed under "suspension of the rules" by a vote of 305 - 112, which was over the 2/3 necessary for passage. Senate hearings on Hatch Act reform were held in late February, 1988 under the jurisdiction of the Senate Governmental Affairs Subcommittee on Federal Services, Post Office and Civil Service.

The National League of Postmasters is strongly in favor of Hatch Act reform which will restore to postal and federal employees their fundamental right to fully participate in the American political system, while prohibiting abuse of office, coercion or improper solicitation. The LEAGUE believes that voluntary political participation by postal and federal employees can only strengthen the political system and add greatly to public debate on crucial national issues. We urge Congressional support for bipartisan Hatch Act reform legislation, as introduced in H. R. 20 and S. 135.

PPHATCH89:cab12/88

PUBLIC EMPLOYEE DEPARTMENT
AFL-CIO

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JOHN F. LEYDEN, *Secretary-Treasurer*

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STATEMENT

of the

PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO

to the

GOVERNMENTAL AFFAIRS COMMITTEE
U.S. SENATE

on

S 135 - HATCH ACT REFORM AMENDMENTS OF 1989

July 25, 1989

815 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006 • (202) 393-2820-21

This statement submits the views of the Public Employee Department (PED), AFL-CIO, to the Senate Governmental Affairs Committee during its hearings and consideration of S 135, the Hatch Act Reform Amendments of 1989. The thirty-three (33) unions, representing nearly 4.5 million federal, state and local public employees that make up the PED, urge full support and prompt approval of this long overdue reform of the Hatch Act. S 135 would permit federal and postal employees to participate in a full range of political activities off-duty, on their own time, and off the worksite.

The stated intent of the 1939 Hatch Act was to protect federal employees from political coercion and our political system from "pernicious" political activities. Today, however, the political activity restrictions embodied in the Act represent an outmoded, overly broad, and thoroughly confusing collection of over 3000 administrative determinations and rules that, in fact, work to coerce federal and postal employees from participating in any, even permissible, political activities. As a result, nearly three (3) million federal and postal employees are being denied their basic right as American citizens to participate in our nation's democratic system of government.

The issue of coercion to affect the political process or the outcome of partisan elections is a matter of serious concern to federal and postal employees, as it is to all American citizens. However, current Hatch Act restrictions are a pure case of unjustifiable over-kill, that have been outdated by developments since the law's enactment. In 1939, less than 32 percent of the federal work force was under the classified merit system. Today, some 78 percent of the work force is under the merit system and the protections that system affords. Since 1939, new codes of employee ethics have been developed; effective and strengthened election laws have been enacted; collective bargaining, grievance procedures, and other employee protections have become well established within the federal work force; landmark court decisions protecting civil and constitutional rights have been handed down; and federal employees were provided extensive additional protections with the passage of the Civil Service Reform Act in 1978. All of these set up an effective barrier to political coercion. In addition, S 135 fully addresses the coercion issue by maintaining and strengthening current Hatch Act penalties.

The question of Hatch Act reform is not a new issue. In 1966 the Congress established an independent bipartisan Commission on Political Activity of Government Personnel which conducted an extensive investigation into the issue and concluded that the Hatch Act's restrictions on voluntary political activity are overly broad and vague and should be revised.

The Federal Election Campaign Act of 1974 amended the Hatch Act as it applied to state and local government employees by removing all of the Act's political activity restrictions, with the exception of running for partisan political office. Responding to the changes in federal law, between 1975 and 1983, thirteen (13) states reduced and liberalized their own laws and restrictions on state and local public employee political activities. A 1983 study conducted by the House Post Office and Civil Service Subcommittee on Civil Service found that, while public employee political activity increased in those states, there was absolutely no evidence of a parallel increase in the improper use of authority or coercion. These findings were reconfirmed by a similar investigation conducted by the Subcommittee in the 100th Congress, where attorneys general from those 13 states reported no evidence of increased political coercion arising out of state law reforms. In fact, the attorneys general could cite no significant incidents of such coercion since the enactment of those reforms. The Merit Systems Protection Board also confirmed these findings, reporting last year that only 12 complaints had been lodged against state and local public employees since 1975.

Most recently, the House Post Office and Civil Service Subcommittee on Civil Service held extensive hearings on Hatch Act reform in the 100th Congress. The Subcommittee concluded on a bipartisan basis that the Hatch Act is in need of substantial reform. As a result, HR 3400 and its counterpart in this Congress, HR 20, were overwhelmingly passed with strong bipartisan support. The April 17, 1989 vote on HR 20 was 297-90. That bipartisan support for Hatch Act reform was again demonstrated, when this Committee, under the sponsorship of Chairman Glenn, drafted and favorably reported-out its own version of Hatch Act reform in the 100th Congress with the input and support of members from both sides of the aisle. S 135 is identical to that bipartisan Senate measure.

An investigation conducted by the House Civil Service Subcommittee during its consideration of HR 3400 in the last Congress brought other relevant facts to light. Requesting a Congressional Research Service study into political activity restrictions on state public employees, the Subcommittee found that 41 states allow their public employees to participate in most general campaign and partisan political activities during their off-duty and non-working hours. S 135 would bring the federal government in line with the practices of the great majority of the states in the area of public employee political activity restrictions. The fact that there is absolutely no evidence of political coercion related to public employee political activity in those 41 states, provides further support for reforming the federal Hatch Act.

The PED urges reform of the Hatch Act because its limitations on federal and postal employee political activities are discriminatory, unjustifiably denying basic rights to a specific group of individuals based solely on their employment. In addition, such limitations on any citizen's political rights diminish and weaken our nation's democratic system as a whole.

For all these reasons, we urge the Subcommittee to favorably and promptly report-out S 135. We thank the Committee for its consideration of our views, presented on behalf of the 4.5 million federal, state and local public employees represented by the 33 unions of the PED.

common cause
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Archibald Cox Chairman
Fred Wertheimer President
John W. Gardner Founding Chairman

June 3, 1988

Dear Senator:

The Senate is expected to consider legislation to make basic changes in the current Hatch Act restrictions on partisan political activity by federal workers. Like the measure passed by the House of Representatives last year, the bill approved by the Senate Governmental Affairs Committee abandons the fundamental concept of an unpoliticized civil service and opens the door to implicit coercion. Common Cause strongly urges you to vote against the Committee proposal.

The House-passed bill, H.R. 3400, would for the first time in almost 50 years allow federal workers to run as candidates in partisan elections, serve as officers of a political party, raise partisan campaign contributions, and administer political action committees (PACs). The only restraint is that the partisan activity would have to occur during off-hours. Common Cause opposed the passage of H.R. 3400.

The Senate Governmental Affairs Committee version of this legislation also makes major changes, lifting most restrictions on partisan political activity. Like the House bill, a federal employee would be permitted, among other things, to serve as an officer of a political party or a PAC, become a public campaign official for a candidate, and run as a delegate to a national convention. The Senate draft does prohibit federal employees from running for partisan political office and from soliciting contributions for partisan candidates. However, it allows government workers to solicit their colleagues for contributions for their own federal employee PACs.

Repeal of the Hatch Act's basic protections, as proposed in both these bills, would increase the potential for widespread abuse and open the way for implicit coercion against which there is no real protection. With basic restrictions on partisan activity repealed, no procedural or other safeguards will be sufficient to protect against subtle forms of political favoritism or coercion of federal workers.

It is important to recognize that under the current Hatch Act, federal workers are already permitted to engage in various political activities. For example, they may make political contributions to candidates, serve as rank-and-file members of political parties, and engage in non-partisan political activities such as running for election to a non-partisan local school board. It is only the most active levels of partisan participation from which they are currently barred. In drawing this line, we believe that the current Hatch Act strikes an appropriate balance between the federal worker's ability to participate in political activities and the public's right to fair and impartial administration of government.

The Hatch Act was enacted to ensure that the federal government is administered in a fair and impartial manner.

Common Cause recognizes that the current regulations governing administration of the Hatch Act are complicated. There may be ways to clarify and simplify for federal workers the degree of participation that is permitted without lifting the basic restrictions on partisan activity, and we urge the Senate to instead explore this area. As a core principle, however, a careful balance must be struck between an individual's right to free speech and association and the public's right to impartial administration of government. We agree with the U.S. Supreme Court, which stated, in upholding the constitutionality of the Hatch Act, that "it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service...."

We urge you to reject the bill reported out by the Senate Governmental Affairs Committee, which repeals the prohibition on partisan political activity by federal workers.

Sincerely,

Fred Wertheimer
President

— Federal Bar Association

Office of the President
Richard J. Wieland

Respond to:
Of Counsel
Perlman & Partners
PO Box 2582
Austin, TX 78768-2582
512/482-8123
ABA 1797

August 17, 1989

Senator William V. Roth, Jr.
Senate Governmental Affairs Committee
SD-340
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Roth:

The Federal Bar Association, representing attorneys who preside over or practice before Federal Agencies or courts, or are Federal employees themselves, would like to reiterate its views on the Federal Employees Political Activities Act, which the Governmental Affairs Committee reported out on July 26th. As we testified at last year's hearing, we believe that the bill contains three major flaws:

1. The bill does not define "political activity". To the extent that problems exist with the current law, it is due to administrative regulation. Why allow administrative regulation to define this very important point of Hatch Act reform?

2. The practical application of the proposed legislation might make political abuse of Federal employees more likely, notwithstanding its continued proscription of superiors pressuring subordinates in any fashion. Currently, generally all active political work is illegal, so there is little temptation by political partisans to recruit Federal employees to engage in such activity simply because such unlawful acts are easily identified. The present legislation will change the focus from proscribing easily identifiable physical acts to proscribing only those physical acts which are improperly motivated through coercion. In this context, we believe it actually is more likely, as a practical matter, that abuse will occur than under the present statute.

3. The pending legislation contains no provision for excepting therefrom any classes of employees. The nature of the duties and responsibilities of some categories of employees such as law enforcement officials and officers, administrative law judges and other independent adjudicators, requires that such employees be absolutely insulated from any possible risk of improper pressure in order to maintain both fact and appearance of the integrity of the Federal government.

Page 2

We strongly urge that you not bring the bill to the Senate floor for a vote. However, if the Senate does pass S. 135, we urge you to forcefully insist on your version of Hatch Act reform over the House version. We find the House version too broad and totally unacceptable.

Thank you for your time. If you desire any further information from us, please do not hesitate to call.

Respectfully,

Richard J. Wieland

Richard J. Wieland
President
The Federal Bar Association

WILLIAM V. ROTH
MAY 1 9 1988
GOVERNMENTAL AFFAIRS

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

May 19, 1988

The Honorable William V. Roth, Jr.
United States Senate
Washington, D.C. 20510

Dear Senator Roth:

The enclosed letter to Senator Glenn regarding the amendments under consideration to the Hatch Act is self-explanatory. We trust you will concur that carving out an exception to any liberalization of the rules governing partisan activities for employees of the Federal Election Commission is worthy of consideration. The Commission appreciates any assistance you may lend in the matter.

Sincerely,

Thomas J. Josefiak
Chairman

Enclosure

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

May 19, 1988

The Honorable John Glenn
Chairman, Committee on Governmental Affairs
Dirksen Senate Office Building, Room 340
Washington, D.C. 20510

Dear Senator Glenn:

The members of the Federal Election Commission wish to express to you our deep concern about the consequences for this agency of proposed legislation revising "Hatch Act" restrictions upon political activity by federal workers. We would respectfully request that an exception be drawn for employees of the Federal Election Commission in any legislation intended to liberalize or relax the rules prohibiting federal employees' participation in political campaigns outside the workplace.

Congress established the Commission as a bipartisan body to administer and enforce federal election laws free of partisan or political considerations. Permitting active political involvement by employees of the Commission, even outside the work environment, could only serve to compromise the capacity of the agency's staff to perform their job responsibilities in a non-partisan manner. The perception that Commission employees are or may be engaged in partisan political activity, even on their own time, would severely undermine public confidence in our ability to properly and fairly carry out the mandate Congress has given us.

The members of the Commission certainly have no objections to those provisions of the act meant to strengthen restrictions upon "on the job" behavior related to political activity. Furthermore, we wish to express no opinion as to the appropriateness of the proposed legislation as it may be applied to and impact upon the federal workforce generally.

We hope, however, you will appreciate our strong reservations about those aspects of the legislation that would, absent a special exception, lift the restrictions upon political activity "off the job" by employees of the Commission. We ask your assistance so that our agency will be able to fulfill our particularly sensitive role in the political process with uncompromised impartiality and credibility.

Sincerely,

Thomas J. Josefiak
Chairman

Statement of the U.S. Chamber of Commerce

ON: HATCH ACT AMENDMENTS

TO: SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

BY: TERI L. PIERCE

DATE: JULY 25, 1989

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

STATEMENT
on
HATCH ACT AMENDMENTS
before the
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
for the
U.S. CHAMBER OF COMMERCE
by
Teri L. Pierce*

July 25, 1989

The U.S. Chamber of Commerce is pleased to have the opportunity to present its views on proposals to amend the Hatch Act.

The Chamber supports the Hatch Act, which protects federal civil service and postal employees from undue political pressure and coercion, and believes that no law should be enacted to permit the solicitation of financial or any other form of support for political candidates and party or other political organizations by such employees.

The Chamber specifically opposes enactment of S. 135, the Hatch Act Reform Amendments of 1989, now before this Committee.

The Hatch Act was passed 50 years ago to protect federal workers from political pressure by elected and appointed officials. The purpose was to separate the work force from the elected leadership. In much the same way that the civil service has protected federal employees from the "spoils system," the Hatch Act has protected these workers from exploiting their office or being exploited by others. It has been a benign barrier to politicizing the federal work force. The Hatch Act has allowed only nonpartisan political involvement by federal employees.

---

*Teri L. Pierce is director of public affairs, U.S. Chamber of Commerce

The Chamber has several concerns about amending the Hatch Act. These include the use of government positions to coerce contractors to contribute to candidates; the exertion of pressure on citizens dealing with the Internal Revenue Service (IRS); agencies that dispense grants or loans having undue influence over applicants; and, particularly, the potential abuse of the federal worker.

It is well known that exertion of political pressure upon and by the New Deal's Works Progress Administration, which became so politicized that the public rebelled against the resulting corruption, prompted the enactment of the Hatch Act in 1939. However, practices prohibited by the act were not unique to that era.

In 1801, President Thomas Jefferson viewed with dissatisfaction government employees' "taking active parts in the election of public functionaries." While upholding the right of such an employee to vote as a qualified citizen, Jefferson said, "it is expected that he will not attempt to influence the vote of others, nor take part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." Restrictions proposed by the Jefferson Administration were never implemented.

The Pendleton Act of 1883 established the Civil Service Commission (CSC) and provided that federal employees under the classified service were free from political assessment and politically motivated removal and were forbidden to participate in politics. The classified service over which the CSC then had authority constituted about 10 percent of the total executive work force.

In 1901, President Theodore Roosevelt issued Presidential Civil Service Rule No. 1, prohibiting all individuals in the classified service from taking "an active part in political management or political campaigns." Roosevelt was frustrated as a Civil Service Commissioner by the CSC's lack of enforcement authority over a system in which only 25 percent of the federal employees were classified, while the spoils system controlled appointments to 75 percent of all federal offices. This rule became law with the enactment of the Hatch Act in 1939.

In signing the Hatch Act into law, President Franklin D. Roosevelt said, "improper political practices can be eliminated only by imposition of rigid statutory regulations and penalties by Congress."

In 1973, the Supreme Court, in upholding for the third time the Hatch Act's constitutionality, declared, "it is in the best interest of the country, indeed essential, the federal service should depend on meritorious performance rather than political service. . . . "

Supporters of the bill are quick to mention penalties for misusing the new-found privileges that it would grant. The envisioned enforcement should be compared with the enormously difficult job of enforcing laws relating to sexual harassment. Innuendo and subtlety are extremely difficult to document.

Violations can be expected to occur, and large numbers may be undetected and unsolved. The American taxpayer will suffer because the productivity of the federal work force will suffer.

If the federal worker were truly disenfranchised as a participant in politics, Congressional reformation might be necessary. However, federal workers can actively participate -- the law only restricts partisan activity. Under the Hatch Act, federal employees may:

- join political clubs;
- contribute money to political candidates and organizations;
- sign nominating petitions;
- campaign for or against ballot propositions;
- attend political fundraising functions;
- wear badges or buttons;
- register voters;
- express opinions; and
- register and vote.

The major prohibitions of the Hatch Act are:

- soliciting campaign funds from fellow workers;
- using federal office for political purposes;
- taking an active part in partisan campaigns; and
- running for office on a partisan ticket.

Federal workers simply will not have the necessary protection from political harassment if the Hatch Act amendments are adopted. Therefore, if Congress enacts these changes, the Chamber believes that Congress should immediately establish a panel to determine the impact of these amendments on the operation of federal offices. Federal employees should be surveyed in a manner that insures anonymity to ascertain their views on the proposed changes prior to enactment.

In its April 12, 1989 analysis of the impact of amending the Hatch Act, the U.S. Department of Justice said:

> any relaxation of the Hatch Act's politicking ban will substantially diminish the protections which federal employees currently enjoy against political pressure, while affording no realistic expectation that the void thus created can be filled by the federal criminal justice system. The Department of Justice remains convinced that nothing short of an absolute bar on partisan political

> activities by federal civil service employees will adequately protect the public's interest in the fair and impartial administration of government programs and policies and the employees themselves from more or less subtle pressure by their superiors. Two principles central to the operation of the Executive Branch — the nonpartisan administration and enforcement of federal laws, and the advancement in federal service based solely on merit — would certainly be threatened and could well be extinguished.

The U.S. Office of Personnel Management expressed similar concerns:

> Permitting partisan involvement makes an employee vulnerable to indirect influence to support actively the party or candidate favored by his superiors. Thus, voluntary political participation, if permitted, could become required participation. Under current law, it is well known that Federal and Postal Service employees cannot serve partisan political purposes. These employees are secure in the knowledge that they need not respond to political requests or suggestions. Eliminating the prohibitions against partisan political management and partisan political campaigning would destroy this protective fabric. The current restrictions on partisan political participation are indispensable to the efficiency, integrity, and independence of both Federal and Postal employees. Moreover, they

provide the most significant protection against political coercion and the encroachment of political influence within the Federal Civil Service as well as the Postal Service.

In the October 12, 1987 Washington Post, a federal worker discussing office contributions of all types concluded, "Please Congress, don't add 'Give to the Party of your choice' . . . There are lots of emotional pitches to give, and I would rather work at the office and contemplate my political orientation in the privacy of my own home where I don't have to consider what my boss will think." One suspects that this person speaks for a large segment of the government work force.

To remove the protection of the Hatch Act would send the U.S. government back down the road of the spoils system and politicization of federal agencies. In the words of President Gerald Ford, "If this bill were to become law, I believe pressures would be brought to bear on federal employees in extremely subtle ways beyond the reach of any anti-coercion statute. . . ."

The Chamber knows no compelling reason to amend the Hatch Act. While it is true that there are certain restrictions on federal workers' political involvement, it is also true that they are a unique group of employees. Their job is the efficient operation of the federal government, with equal treatment of all taxpayers regardless of political persuasion. The Hatch Act amendments will remove protections from federal workers and from taxpayers.

Congress should act to strengthen government by rejecting the Hatch Act amendments. Federal workers need and want a harassment-free workplace. The American taxpayer deserves no less than top performance. The Hatch Act was passed to cure the serious problem of political coercion in the federal work force. S. 135 would allow that problem to reemerge.

NATIONAL TAXPAYERS UNION

A NONPARTISAN, NONPROFIT ORGANIZATION DEDICATED TO THE PUBLIC INTEREST

325 PENNSYLVANIA AVENUE, SOUTHEAST
WASHINGTON, DISTRICT OF COLUMBIA 20003
TELEPHONE: AREA CODE (202) 543-1300

August 17, 1989

Dear Senator:

The National Taxpayers Union, on behalf of its 200,000 members, opposes S. 135, the "Hatch Act Reform Amendments of 1989" and urges you to vote against it when it reaches the Senate floor. NTU believes this proposal, if approved, would destabilize existing Hatch Act checks and prohibitions and transform this country's Federal workforce into a politicized mockery of what is now a well-respected, impartial government service.

Currently the American public does not harbor animosity towards Federal workers. NTU is convinced that this is specifically due to current Hatch Act rules which ban certain partisan highly visible, group-connected political activity by those who have made a choice to pursue a government career. This has been a good system and it has worked to the advantage of the taxpayer by preventing the politicization of government workers.

NTU is also convinced that if public servants began participating in the political processes as allowed by S. 135 they would very shortly be known as partisan. Once so identified they would become the target of political interests and in no time at all political rather than public purposes would be served.

In particular, taxpayers fear:

- Goverment contracts being awarded for political rather than cost and quality considerations;
- Promotions being granted for partisan rather than merit criteria;
- Government time being used for political projects; and,
- Workers being pressured to support political rather than public ends.

But the taxpayers most fundamental reason for opposing Hatch Act revisions is that the proposed changes would increase the pressure for growth in the Federal government. Government workers already have a phenomenal power to enlarge their bureaucracies, their programs, their pay and their pensions. The proposed Hatch Act revisions would simply skew an already lopsided influence further.

NTU conducted a quick survey of the rules other countries apply to their civil services regarding partisan activities. In those countries with fewer restrictions on partisan activity, such as Bolivia, France and Chile, there have been more problems with corruption. Countries which have established a more nonpartisan civil service, such as Japan and Canada, have experienced fewer problems.

For these and other reasons, NTU encourages you to leave the Hatch Act intact and to vote against revisions proposed in S. 135.

Sincerely,

Sheila Macdonald

Sheila Macdonald
Director, Government Relations

12:17

ipma

International
Personnel
Management
Association

1617 Duke Street
Alexandria, Virginia 22314
(703) 549-7100

STATEMENT OF

THE INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION

ON

THE HATCH ACT REFORM AMENDMENTS

The International Personnel Management Association (IPMA) has carefully evaluated the "Hatch Act Reform Amendments" that would permit all off-duty Federal career civil service employees to engage in a variety of partisan political activities currently prohibited by the Hatch Act. We have concluded that the proposed legislation is not in the public interest and should not be enacted.

By way of introduction, IPMA is an organization representing over 1,3000 member agencies that include civil service commissions, merit system boards and personnel departments at the Federal, state and local levels of government. The Association also represents 55,000 individuals, primarily human resource professionals and managers in the public sector and educators in the fields of public and personnel administration. IPMA's objective is to develop an interest in sound human resource management and provide a focus and a forum for the discussion and exchange of views among practitioners and theoreticians throughout the United States and abroad.

The Association is concerned that (1) the involvement of career civil service employees in partisan political activities will erode citizen confidence that their laws and regulations are being impartially enforced and (2) public programs and services continue to be delivered on a nonpartisan basis without regard to the recipients' political beliefs or affiliations.

In passing the Hatch Act originally, the Congress determined that partisan political activity by Federal career civil servants and those in state government who administer Federal grant-in-aid programs must be limited if public institutions are not only to function, but also to appear to function, fairly and effectively. The Congress sought to establish a careful balance between the right of a Federal employee, as an individual, to participate in the political process, and the necessity for the country to have a nonpartisan, politically neutral civil service to administer and implement its laws. It prohibited activities that could coerce Federal career civil servants and their state government counterparts into giving up their political independance in order to retain their employment and advance in their careers. If the proposed legislation is passed, we are concerned that the career civil servant's visible participation in partisan political activities, even when not on duty, will subvert the Congress' initial intent and erode citizen confidence in the impartiality of its civil servants.

Administration of the public's business is sufficiently frought with the opportunity for honest disagreement now, without ntroducing the notion that governmental decisions, whether avorable or unfavorable to the claimant, petitioner or aplicant, are colored by political favoritism. A number of xamples of the potential for unnecessary conflict come easily to mind:

- Taxpayers contesting Internal Revenue Service decisions concerning tax liabilities;
- Foundations seeking tax-exempt or other special tax status;
- Claimants contesting Social Security Administration decisions over benefits or disability determinations;
- Mine owners contesting decisions by the Mine Safety and Health Administration;
- Farmers and small business men contesting decisions over eligibility for Federal or state assistance;
- Grant applicants who are denied funding;
- Unsuccessful bidders on public contracts;
- Unsuccessful applicants for government employment or career advancement in the civil service; and
- Unemployment insurance applicants who are denied compensation.

Why even suggest the possibility that those who are responsible for making these kinds of decisions are anything but impartial and apolitical in their deliberations?

Another concern is the potential effect such a statutory change could have on relationships between political appointees, of any Administration, and the career civil servants upon whom they must rely to carry out their policies and programs. Cooperation between the policy makers and implementers is essential to effective governing. Again, it is not difficult to envision a situation, allowed by the proposed legislation, in which a career civil servant runs for political office as a partisan candidate, is defeated and returns to work. This person may encumber a position that is proximate or reports directly to a political appointee who is of the opposing political party. Will it be possible for the political appointee to have full trust and confidence in that career civil servant? If not, what effect will that have on the ability of the civil servant to function effectively, and what impact will this have on the organization's ability to perform its mission?

As an Association, we are concerned with the integrity of legally mandated merit systems. The intent in legislating such systems was to ensure that decisions concerning hiring, development and advancement of its employees be made on the basis of the relative merits of the competing applicants, rather than on the basis of their political affiliations or other nonmerit factors. We believe this change in the law would send the wrong message and that, wittingly or unwittingly, there will evolve the perception that hiring, promotions, developmental assignments and performance bonuses are best earned by demonstrating the "right politics."

We recognize that the proposed legislation attempts to incorporate protections to prevent problems of the kind referred to above. However, the atmosphere in which employees work can contain politically coercive elements even though no legally definitive evidence of coercion can be demonstrated. It is simply not possible to protect career civil servants from reprisal for overt partisan political activities. That protection is not possible in the current environment where political activities are, at most, covert and the statutory protections are strong; how much more difficult will it be to assure that protection in an environment where "off duty" partisan political activity is permitted? Is the political appointee really expected to be able to ignore political activity that is adverse to the interests of his/her party or in conflict with his/her ideological beliefs because it occurred after working hours? We believe that is far too much to expect of anyone.

The principle of political neutrality for career civil servants is a commonly accepted tenet of public employment, both in the United States and in other countries. A study of civil service laws by the United Nations concluded that "the political neutrality of the civil service is a fundamental feature of multiparty democracy and is essential for its efficient operation."1/

Concern over the politicization of the civil service was expressed as far back in our history as the presidency of Thomas Jefferson. The excesses that led to the enactment of the Hatch Act in 1939 are well documented, and the need to insulate the civil service from partisan politics is as compelling today as it was in 1939, if not more so. The Hatch Act does not disenfranchise career civil servants; what it does is preclude them from labelling themselves as Republican or Democrat civil servants and making targets of themselves for public suspicion or political reprisal.

Close to three million Federal career civil servants, and a similarly significant number of state employees, are covered by the Hatch Act. They do not consider themselves second-class citizens and most of them are not petitioning for emancipation. In general, career civil servants accept the terms of their government employment voluntarily. They fear political coercion and unlawful discrimination far more than the covet the chance to engage in partisan political activities by running for office, attending political conventions or managing political campaigns.

While the proposed legislation appears limited to Federal employees, the potential impact of this legislation on state and local government employees can not be overlooked. A number of states and many local governments have laws restricting partisan political activity by their employees, many of them patterned after the Hatch Act. Modifications to the Federal statute can't help but ultimately affect the protections now afforded state and local government employees.

Over the past several years, we have witnessed an erosion in the confidence of the public in all levels of government. Any legislation that impairs the neutrality of the civil service can only result in a further reduction in the public's confidence. As Justice White noted in the case of National Association of Letter Carriers v. United States Civil Service Commission, "it is not only important that the government and its employees in fact avoid practicing political justice, it is also critical that they appear to the public to be avoiding it if confidence in the system of representative government is not to be eroded to a disastrous extent."2/

IPMA's concern is that the proposed amendments to the Hatch Act will foster the appearance, if not actually create the possibility, that decisions made by career civil servants can and are being made for partisan political reasons. Such a perception would have a severely negative impact on the ability of career civil servants to carry out their responsibilities to any Administration and to the American public whom they serve.

1/ Vaughn, Robert G., "Restrictions on the Political Activities of Public Employees, The Hatch Act and Beyond," George Washington University Law Review, Vol. 44, 1976, page 532.

2/ 413 U.S. 565

~~[illegible]~~ : Glenn

INFORMATION
FOR
FARMERS HOME
ADMINISTRATION
COUNTY COMMITTEES

U.S. Department of Agriculture

October 1986

farmers from across
the country who
are members of FHmA
County Committees
are probably violatin
the Hatch Act accordin
to the Dept of Ag!
Is the Bush admin in
favor of this? Will
special counsel pursue?

PLOYMENT OF COMMUNITY COMMITTEE MEMBERS

I. COMPOSITION OF COUNTY AND/OR AREA COMMITTEE

A. Each county or area committee will be composed of three members, two of whom are elected and be farmers deriving the principal part of their income from farming and have their principal farming operation within the county or area. The other member is designated by the State Director and may be a non farmer engaged in local business or professional work who resides in the county or area in which the activities of the county committee are carried out. One or more alternate members may also be designated to serve on the committee in the temporary absence of regular members.

B. Members must be citizens or aliens lawfully admitted to the United States for permanent residence.

C. They should not be FmHA borrowers, officials of FmHA-financed associations, employees of FmHA, Agricultural Stablization and Conservation Service, Soil Conservation Service, Extension Service or members of advisory boards or committees for these agencies.

D. Designated members must be in sympathy and accord with the family farm concept, be familiar with the problems of farmers and residents of rural communities, and be in general agreement with the objectives of FmHA.

E. Eligible minorities and females will be designated, wherever possible, on county and/or area committees. Efforts will be made to obtain recommendations from civil and women's rights organizations. Some minority representation is expected where minorities comprise 20 percent or more of the rural or farm operator population, whichever is greater.

I. ELECTION PROCEDURE

A. All regular elections of county committee members shall be held in June on a date selected by the State Director.

B. Information concerning county committee elections shall be published in county newspapers or other publications serving the county in which the election is held.

C. Nomination by petition is the method used for developing slates of nominees. The petitions must be signed by at least three eligible voters from the county or area in which the election is held. The period for nominations is normally 25 days but no less than 5. All properly nominated candidates appear on the ballot.

D. Eligible voters are individual farmers or legal entities such as corporations or partnerships engaged in agricultural production who derive their prinicpal part of income from farming and who have their principal farming operation within the county or area in which the election is being held.

E. Ballots with slates of nominees will be published in county newspapers or other publications serving the county in which the election is held 10 days prior to the election. Ballots may also be obtained from FmHA offices. Ballots may be brought in person to the county office on the day of election or mailed and received in the county office the day of the election.

D. Ballots will counted by the County Office staff during normal office hours and members of the public are welcome to attend.

III. TERM OF OFFICE

A. Three years. One committee member's term expires each year. Since one member of the committee is designated and not elected, elections will occur two out of every three year.

B. When special elections are necessary in filling permanent vacancies, or vanancies caused by inability to complete a slate during a regular election, the committee members elected by this method will serve out the unexpired term.

IV. PAY

A. Twenty-one dollars per day. Limited to 20 days per month maximum. Rates are set by the Secretary of Agriculture, subject to the constraints of the appropriations process.

B. Allowance in lieu of mileage and per diem, as follows;

25 miles or less (one way)-$6
26-50 miles-$9
51 miles and over-$12

V. CONDUCT

A. Committee members cannot have business dealings with borrowers, except on advice from the County Supervisor or approval of the State Director.

B. Political activity

1. Members cannot hold office in a political club or political organizations, such as a precinct committee, or be active in the affairs of such political club or organzation.

2. Cannot be a candidate for a political elective office.

3. Cannot hold a State of local public office.

C. Must keep confidential any information on applications and borrowers.

D. Must avoid any bias in deliberations and decisions relating to assigned duties and responsibilities.

VI. SEPARATIONS

Members may be separated from the county committee if they resign, enter military service, engage in unauthorized political activity, become candidates for political office or engage in conduct that reflects adversely on FmHA and the Department of Agriculture.

VII. EMPLOYEES' COMPENSATION ACT

A. Compensation benefits apply for all civil employees of the Federal Government including county committee members.

B. The Federal Employee's Compensation Act is a law to provide compensation for disability and death and full medical care for civilian employees who suffer injuries in the performance of their duties.

C. Accidents occurring in the line of duty should be reported immediately to the County Supervisor.

FmHA POSITION RESPONSIBILITIES

COUNTY AND AREA COMMITTEES

County and area committees certify the eligibility of applicants for farmer program loans. . . Assist the local FmHA office in adapting national policies to local conditions. . . Make recommendations on applications for compromise, adjustment or cancellation of debts, and for servicing actions on farmer program loans. . . Perform other tasks as may be assigned to the committee from time to time. . . Committee members may be called upon to furnish information in connection with routine inquiries and to discuss various phases of program activities with State and National Office employees. However, they are seldom involved in housing program loans.

COUNTY SUPERVISOR

Administers the farmer and single family housing programs and provides leadership for the rural development effort in the county or counties serviced by a county office. . . Reviews, evaluates, verifies, determines eligibility (with the help of the county committee for farm loans) and approves applications, including determining the type and amount of assistance. . . Helps families and groups develop plans of operation before loans are made to determine soundness and repayment ability. . . Visits borrowers' operations, inspects development work and security property, assists with long range plans. . . Is responsible for assembling loan dockets, closing loans, and making collections. . . Appraises real estate (as delegated) and chattel property. . . Provides supervisory and farm management assistance. . . Handles initial inquires concerning community program assistance. . . Keeps the public informed on assistance available through FmHA and application procedures.

DISTRICT DIRECTOR

Processes and services multifamily housing loans, community program loans and grants . . . Works closely with substate planning districts and other public and private agencies to coordinate rural development plans. . . Gives administrative direction and technical leadership to the planning and carrying out of FmHA program operations in a group of county office units. Provides guidance and supervisory assistance to county office staffs in making and servicing farmer program loans.

STATE DIRECTOR

Responsible to the Administrator. . . Within established policies and delegated authorities, administers all activities of FmHA in one or more States. . . Leads in the development of annual goals and long range plans . . . Insures a proper balance among all activities in the State program . . . Develops and carries out training programs. . . Evaluates program accomplishments and operations. . . Carries out public information programs. . . Supervises and encourages outreach efforts in the State and gives direction in guiding programs toward the most needy persons and the most severely disadvantaged communities. . . The State Director is assisted by an Administrative Officer who is responsible for statewide administrative management, and by program chiefs in the three major program areas -- farm, housing, and community and business development. . . State offices may have other resource positions such as property management and support specialists, architects, engineers, or special projects representatives.

[From the Wall Street Journal, January 3, 1989]

Politics & Policy: Lobbying of Bush Transition Office Is Turning To Matters of Policy From Personnel Choices

(By David Shribman)

Washington.—The lobbying around the Bush transition office is beginning to shift from a struggle over filling high administration posts to debate over what policy positions the new administration will take.

President-elect George Bush has filled out most of his cabinet in the two months since his election and now, with the inauguration less than three weeks away, business organizations, trade associations and groups representing myriad interests are sending letters, monographs, notebooks and even videocassettes to a Bush operative name James Pinkerton.

For years, Mr. Pinkerton toiled in obscurity, bounding around Republican politics, the White House and various tucked-away corners of government like the Postal Rate Commission. But now Mr. Pinkerton is the 30-year-old director of policy development at the Bush transition headquarters. The office has its own zip code, and the piles of policy recommendations go to him.

"The big lobbying at the transition is on policy and it's really just begun," says Republican Sen. William Armstrong of Colorado, who has done some of the lobbying himself. "By the time January's out, it'll be the biggest game in town.

A number of environmental groups are pressing the Bush transition team to embrace more than 700 recommendations, including a 20% increase in the budget of the Environmental Protection Agency and new deadlines for compliance with clean-air standards. The conservative Heritage Foundation is pressing the president-elect to work to increase the defense budget beyond his campaign promises. Boeing Co. is asking Mr. Bush to push for a research-and-development program for air-traffic-control development and to accelerate the modernization of airports. The American Conservation Union is urging Mr. Bush to oppose unrestricted loans to the Soviet Union by Western commercial banks.

"We're trying to get the Bush people on record," says Dan Casey, executive director of the American Conservative Union, "so we can go back to them when the implementation of policy starts."

Although scores of important sub-cabinet appointments still are to be made, the pace of policy lobbying is picking up as the new year begins. "The First Amendment gives you the right to petition your government," says Mr. Pinkerton, "and a lot of people are petitioning their future government."

The value of these tactics is questionable, however. "It is nice for people to assume that all they have to do is to send a 20-page recommendation and to think it is going to influence policy," says Gov. John Sununu of New Hampshire, who is to be the White House chief of staff. "All of that will be treated with respect appropriate to the author, but that is not in the long run how policy gets made or influenced."

Much of the ferment is among conservatives. The Heritage Foundation's policy manual, "Mandate for Leadership III," runs more than 900 pages. The Free Congress Center for Law & Democracy is urging constitutional mechanisms for the imposition of the death penalty in the federal legal system, adjustments in habeas corpus law and codification of the Supreme Court's revisions of the exclusionary rule.

"The hope is that Bush will have a moderate cast of characters taking conservative positions," says Patrick McGuiggan, a senior scholar at the center.

Although much of this lobbying takes the form of lengthy policy memoranda—the U.S. Chamber of Commerce produced a hefty blue notebook titled "Policy Recommendations for President-elect Bush" that got lost in the transition bureaucracy and never reached Mr. Pinkerton—some of it is being done in person.

Phillip Truluck, executive vice president of the Heritage Foundation, made a personal appeal to Mr. Bush, urging the new president to adopt an aggressive veto strategy from the start.

"Anytime an appropriation bill comes in above the administration's levels, it should be vetoed," says Mr. Truluck. "This will work if it's done up front and if there's no question in anyone's mind that it will be vetoed."

Mr. Truluck also pressed Mr. Bush to put Congress on notice that he won't accept any continuing resolutions, the catch-all spending bills that Congress often delivers to the president at the end of a session. "The main job of the Congress is to appropriate money, and if they can't do it correctly they shouldn't ask the president to bail them out with a continuing resolution," Mr. Truluck advises.

At the same time, Washington lobbyist Nancy Reynolds, a close friend of Nancy Reagan, met with transition officials to express her concerns about the cleanup of the nuclear site at Hanford, Wash.; a number of conservative economists made the case for a free-market energy policy; leaders of consumer groups, including the Citizen/Labor Energy Coalition, urged the new administration to address the problems of global warming and the "excess use of fossil fuels," and leaders of the Edison Electric Institute and the American Mining Congress paid calls on transition officials to make a pitch for their interests.

Some of the lobbying is being done by lawmakers themselves. Sen. Armstrong has spoken directly with Mr. Bush about indexing the capital-gains tax for inflation and has approached transition officials about making corporate dividend payments tax-deductible. GOP Rep. Richard Cheney of Wyoming is pressing the new administration to "try to shore up the democracies around Nicaragua."

Meanwhile, Mr. Pinkerton is sifting through the reams of policy documents and recommendations that arrive at the transition office daily.

During the fall, Mr. Pinkerton, whom Bush campaign manager Lee Atwater calls "my closest intellectual adviser for the last seven years," provided bales of negative campaign research on Gov. Michael Dukakis of Massachusetts, the Democratic nominee for president. Today Mr. Pinkerton's research takes a different tack.

"He's getting every Rube Goldberg political idea you can imagine," says Mr. Atwater, who is to be the new chairman of the Republican National Committee. "He's getting hit with programs, ideas and gimmicks every day."

Columbia University, for example, is urging Mr. Bush to use its campus for a presidential conference on higher education. The Hoover Institute sent along its "practical solutions" for the "economic challenges facing the next administration," including "instanteneous world market liquidity." A lawyer for a group of fraternal benefit societies is warning that proposals to tax such groups as if they were commercial insurance companies is "a grave injury to American fraternalism." And the U.S. Chamber is pushing for scores of policy changes, including a full-time foreign-investment secretariat in the Treasury Department and new initiatives with Canada to develop a joint position on foreign agricultural subsidies.

"It's not too early to start fighting these battles," says Lawrence Hunter, the Chamber's deputy chief economist.

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